petition

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-961

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, AND EMPIRE CITY SUBWAY COMPANY (LIMITED),

Petitioners,

v.

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, INDUSTRIAL COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, AND JAMES H. TULLY, JR., STATE COMMISSIONER OF TAXATION & FINANCE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in this case.

The Opinions Below

The opinion of the Court of Appeals for the Second Circuit,[1] not yet officially reported, appears in the Appendix

[1] Meskill, Circuit Judge, Bryan and Stewart, District Judges of the Southern District of New York.

hereto (1a-18a) and is unofficially reported at 96 L.R.R.M. 2921. It reverses the decision of the United States District Court for the Southern District of New York (Owen, J.) (23a-54a), reported at 434 F. Supp. 810, which held the payment of unemployment compensation to strikers under the New York Labor Law to be an unconstitutional infringement upon federal labor policy.

Jurisdiction

This petition for certiorari has been filed within 90 days of the entry of judgment of the Court of Appeals on November 9, 1977. This Court's jurisdiction to review the judgment below is invoked under 62 Stat. 928, 28 U.S.C. §1254 (1).

Questions Presented

1. Whether Congress, in fashioning a comprehensive national labor policy mandating government neutrality in labor disputes and leaving the area of collective bargaining to the free play of economic forces, intended that the several states be permitted to grant unemployment compensation to strikers at the expense of the struck employer.[2]

2. Whether the federal policy of government neutrality in collective bargaining must give way to state enactments granting employer-financed unemployment compensation to strikers, regardless of the adverse impact of such benefits on free collective bargaining.

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[2] The decision below is in express disagreement and in conflict with a decision of the Court of Appeals for the First Circuit on this issue, as well as with decisions of several district courts. See pp. 10-14, *infra*.

Constitutional Provision Involved

Article VI, Clause 2, of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding.

Statutes Involved

Section 592.1 of the New York Labor Law (McKinney 1977) provides for the payment of unemployment compensation to strikers after a "Suspension of accumulation of benefit rights":

> 1. Industrial controversy. The accumulation of benefit rights by a claimant shall be suspended during a period of seven consecutive weeks beginning with the day after he lost his employment because of a strike, lockout, or other industrial controversy in the establishment in which he was employed, except that benefit rights may be accumulated before the expiration of such seven weeks beginning with the day after such strike, lockout, or other industrial controversy was terminated.

The pertinent federal labor policy is embodied in the National Labor Relations Act, *as amended* (hereinafter

"NLRA"), 29 U.S.C. §§141 *et seq.*, and is described at pages 21-22 and note 16, *infra*.

Statement of the Case

A. *The Proceedings.*

This action was commenced on October 24, 1973.[3] The complaint sought, along with other relief, a judgment declaring the New York statute providing unemployment compensation for strikers unconstitutional. Respondents moved for a summary judgment dismissing the complaint and the District Court (Owen, J.) denied the motion in all respects (Memorandum Opinion #42,125, filed March 31, 1975, appearing at 55a-56a).

The issue of liability was first and separately tried, with the understanding that the question of the amount of monetary damages would subsequently be heard if the statute in question were found to be unconstitutional. The trial consumed nine days, during the course of which the District Court heard twelve witnesses and received approximately 450 exhibits. On May 23, 1977, the District Court issued its Opinion and Order declaring the New York statute unconstitutional to the extent it provides unemployment compensation to strikers. Thereafter, on June 24, 1977, the District Court issued its Declaratory Judgment and Order for Permanent Injunction (19a-22a), subsequently entered on June 27, 1977.

[3] The District Court had jurisdiction of this case under 28 U.S.C. §§1331, 1337 and 1343. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars in respect to each of the plaintiffs-petitioners.

On November 9, 1977, after an expedited appeal, the Court of Appeals for the Second Circuit reversed the decision below and remanded with instructions to dismiss the complaint.

B. *The Facts.*

The facts in this case, as found by the District Court (24a-28a), were implicitly accepted by the Court of Appeals (5a-6a). In the words of the Court of Appeals, they proved a "conflict between New York's statute and the broad federal policy of free collective bargaining" (17a). And, as stated by the District Court, "to the extent it [the New York statute] provides for the payment of unemployment compensation to strikers [it] is state intervention on behalf of the strikers, causes an employer to finance its own strikers, [and] is in conflict with federal labor policy" (54a).

Notwithstanding this proven conflict, the Court of Appeals reversed the finding below of unconstitutionality on the ground that Congress, in effect, had granted the several states *carte blanche* to provide unemployment compensation to strikers regardless of the impact thereof on the federal labor policy of government neutrality in labor disputes and free collective bargaining.

New York's Unemployment Insurance Law grants striking employees unemployment compensation after a waiting period of eight weeks. N.Y. Labor Law §§590.9, 592.1 (McKinney 1977).[4] No showing of need is required to entitle

[4] Rhode Island has a similar law requiring a waiting period of seven weeks. R.I. Gen. Laws §28-44-16. Other states have different laws under which unemployment compensation is paid to strikers. There are at least 15 other lawsuits presently pending in the federal courts challenging laws of this kind on federal labor law preemption grounds. These cases are cited at page 15, *infra*.

a striker to weekly benefits which, under present law, amount to a maximum of $115.00 and, as of September 1978, will be increased to $125.00.[5] Since New York's unemployment compensation system is financed solely by employer contributions, the cost of making these payments is borne by the struck employer (6a).

The District Court

> regard[ed] it as a fundamental truism that the availability to, or expectation or receipt of a substantial weekly tax-free payment of money by, a striker is a substantial factor affecting his willingness to go on strike or, once on strike, to remain on strike, in the pursuit of desired goals. [28a; footnotes omitted]

It, however, did not simply rely on this truism. In making its findings of fact, it found in the extensive record before it "confirmation of . . . [the truism] everywhere" (28a).

The present case arose out of the seven-month long strike in 1971-1972 against petitioners by the New York locals of the Communications Workers of America (AFL-CIO) ("CWA"), during which some $49,000,000 in unemployment insurance benefits were paid to some 33,000 strikers.

In June of 1971, the CWA recommended a nationwide strike, which began on July 14. On July 18 an agreement in principle, subject to ratification by mail, was reached and the CWA ordered all employees back to work on July 21. Despite this directive by the International CWA, roughly 38,000 CWA members employed by the New York

[5] The maximum was $75.00 during the 1971-1972 strike involved in this case.

Telephone Company ("Telco") and Empire City Subway Company (Limited) ("Empire") remained on strike in New York. Employees of Western Electric Company ("Weco") and of American Telephone & Telegraph Company, Long Lines Department ("Long Lines") also stayed off the job in New York. CWA-represented employees outside of New York, however, returned to work.

A national membership ratification vote was set for August 14, 1971, and both CWA and its top official in New York State strongly endorsed the ratification. The balloting resulted in a resounding ratification of the contract in every CWA bargaining unit across the country with the exception of the New York State unit for Telco and Empire, and the strike was continued in New York.[6]

During the first week of September 1971 the strikers became eligible for weekly unemployment compensation in a tax-free amount "adequate or almost adequate to meet essential needs" (37a) and, as previously mentioned, benefit payments to the strikers amounted to some $49,000,000 before the strike ended.

The substantial impact of these payments to strikers on the CWA strike and on the collective bargaining of both the union and the struck employers is summarized in the opinion of the District Court (26a-32a). Illustrative of this impact was the description at trial by Telco's chief negotiator of how the availability and payment of unemployment compensation to the strikers was an important consideration in shaping his bargaining position. Thus, Telco's position during the early months of the strike was premised in large part on the belief that the attempt

[6] The strike was subsequently ruled illegal by the National Labor Relations Board in *Communications Wkrs. of America (New York Tel. Co.)*, 208 N.L.R.B. 267 (1973). 28a.

by CWA's locals in New York to break the national pattern "could only lead to labor turmoil throughout the Bell System" and, accordingly, should be firmly resisted. After a number of months had passed, however,

> Telco saw that the strike would not end without some concession to union demands and, noting that employees were still eligible for six or more months of unemployment compensation, decided to settle along the lines recommended by the federal mediator. [27a]

The importance of the expectation and receipt of unemployment compensation to CWA and its striking members is also unmistakable in CWA's own statements on the subject. Shortly after the strike, the union's strike leader, a Vice President of the International, wrote to the New York CWA employees:

> The fact that more than 80% of the membership stood together for 218 days is simply incredible. In my judgment, it is a testimonial to three phenomena:
>
> 1. Dedication and spirit of the strikers
> 2. Unemployment insurance
> 3. Effectiveness of CWA's defense fund [P. Exh. 159]

The extent and nature of the impact of unemployment compensation on collective bargaining and strikes generally cannot be fully appreciated without sampling the flavor of union statements such as the foregoing. The District Court's opinion culled but a few examples[7] from the hundreds placed in evidence. The District Court found further support for petitioners' position in the testimony of distinguished experts called by petitioners (pursuant to the suggestion made in the opinion in *Grinnell Corp.* v. *Hackett,* 475 F.2d 449, 459 (1st Cir.), *cert. denied,* 414 U.S. 858, 879 (1973)) and in statistical and empirical studies offered by them (33a-38a).

[7] Those emanating from the CWA strike against petitioners are discussed at 29a-32a; those from other strikes by the CWA as well as other major unions appear at 32a-33a.

The Reasons for Granting a Writ

The proven "conflict between New York's statute and the broad federal policy of free collective bargaining" (17a) is one of pervasive and substantial proportions. It calls for review by this Court of the opinion below so that it may settle the important question of whether Congress has manifested an intent to narrow the scope of its uniform labor policy by permitting state laws which pay unemployment compensation to strikers and which force employers to finance strikes against themselves.

The Second Circuit's decision is in conflict with the decision of the First Circuit in *Grinnell Corp.* v. *Hackett, supra,* and with the reported decisions of all federal district courts in the same and other circuits which have ruled on the same subject matter. These include district courts in New York, Hawaii and Michigan.

The opinion below, as we shall show, is also in basic conflict with this Court's decision in *Nash* v. *Florida Indus. Comm'n,* 389 U.S. 235 (1967), and with its decisions in other cases defining the scope and force of the labor law preemption doctrine.

This case is of fundamental importance in the labor-management field and numerous lawsuits around the country raising questions the same as or kindred to those presented here are pending in various stages of litigation. There are presented here conflicts and divisions among the courts which, we submit, urgently need resolution.

1. *The Decision Below Is in Conflict With the Decision of Another Court of Appeals and With Those of Several District Courts in the Same and Other Circuits on the Same Subject Matter.*

The District Court in this case found that the New York Unemployment Insurance Law, insofar as it grants unemployment compensation to strikers, (a) constitutes state intervention on their behalf, (b) tips the economic scales in their favor and (c) forces New York employers to subsidize lengthy strikes against themselves, all in conflict with the preemptive federal labor policy of government neutrality in labor disputes (28a, 45a, 54a). It accordingly declared the statute, to the extent it subsidized strikers, invalid under the Supremacy Clause of the United States Constitution (20a, 54a).

Although the Court of Appeals opinion implicitly accepted the District Court's findings concerning the head-on conflict and substantial interference with the federal scheme, it nevertheless reversed, concluding that the federal labor policy must give way since

> the conflict between New York's statute and the broad federal policy of free collective bargaining does not render the State statute unconstitutional. The conflict is one which Congress has decided to tolerate. [17a]

This "inference" was drawn, as the Court of Appeals acknowledged, in the absence of any "*positive* expression of congressional intent" (emphasis supplied) and in disagreement and conflict with the decisions of all "[t]hose courts that have considered Congress' intent with respect to the payment of unemployment benefits to strikers" (7a).

After an in-depth review and analysis of congressional intent and of the very same legislative history on the subject of unemployment compensation for strikers as here considered, the Court of Appeals for the First Circuit in *Grinnell Corp.* v. *Hackett*, concluded that:

> the existing legislative record is not sufficiently clear to establish Congressional intent either way . . . . [475 F.2d at 454]

And further, at page 457:

> The *most* that can fairly be said, in the face of this legislative record, is that Congress has been and presently is aware of the problem, has had the opportunity to resolve it, and has acted in closely analogous circumstances.
>
> [*U*]*nambiguous Congressional intent is lacking* . . . . [Emphasis supplied]

Finding no controlling legislative intent either way, the First Circuit in *Grinnell* reversed the dismissal of the complaint which challenged payments to strikers under Rhode Island's unemployment compensation statute (almost identical to New York's), and remanded the case for trial. Its opinion blueprinted the kinds of proof on the issue of preemption which should be adduced at trial by plaintiff. It

is clear from the findings below in the case at bar that petitioners have supplied that proof here. The *Grinnell* case has yet to be tried.

The preemption issue posed here was the subject of a decision reached after a plenary trial in another case involving the payment of unemployment compensation to strikers. *Hawaiian Tel. Co.* v. *State of Hawaii Dep't of Labor & Indus. Rel.*, 405 F. Supp. 275 (D. Hawaii 1975), *appeals docketed* (9th Cir. Mar. 19 and May 12, 1976) (Nos. 76-1584, 76-2056). The district court there, after granting a preliminary injunction against the continued operation of the Hawaiian law,[8] tried the case. Having found, after trial, that the Hawaiian law exerted a substantial impact on collective bargaining and strikes, it thereupon concluded that Hawaii's statute irreconcilably intruded into the federal process of free collective bargaining and, in the absence of any congressional approval, must be nullified. 405 F. Supp. at 290.

On the subject of congressional intent, the court, in agreement with the First Circuit, said:

> There is no point in this decision to retrace the same road toward determination of Congressional intent that was so laboriously trudged by Judge Coffin in *Grinnell*. On the broad problem of payment of unemployment compensation to strikers, this court agrees with *Grinnell*, at 457 that "unambiguous Congressional intent is lacking" . . . . [405 F. Supp. at 286]

The same labyrinth of legislative history was also traversed by the court in *Dow Chem. Co.* v. *Taylor*, 57 F.R.D.

[8] *Hawaiian Tel. Co.* v. *State of Hawaii Dep't of Labor & Indus. Rel.*, 378 F. Supp. 791 (D. Hawaii 1974).

105 (E.D. Mich. 1972), and was again found inconclusive.[9] The state law there, on its face, barred unemployment insurance benefits in labor disputes, but it was being circumvented. In denying defendants' motion to dismiss Dow's challenge to payments, the court stated:

> This court does not believe, as defendants and intervenors suggest, that congressional inaction or failure to pass particular amendments to unemployment tax laws result in a definitive statement of congressional intent. [57 F.R.D. at 108]

In the case at bar the District Court judge *twice* retraced the very same ground covered by the courts in the *Grinnell, Dow* and *Hawaiian Telco* cases, first on respondents' motion for summary judgment and again at trial, and reached the very same conclusion as did those other courts.

Another district court judge in the Second Circuit recently was presented with the same issue of congressional intent, this time in the context of a motion for a preliminary injunction restraining the State of New York from paying unemployment compensation to striking employees in a dispute between a television broadcasting company and the union representing its engineers. *American Broadcasting Cos.* v. *New York State Dep't of Labor*, 77 Civ. 2995 (S.D. N.Y. June 30, 1977). Judge Cannella, citing *Grinnell*, there stated:

[9] An appeal to the Sixth Circuit has been certified in this case on a different issue. *Dow Chem. Co.* v. *Taylor*, 428 F. Supp. 86 (E.D. Mich. 1977), *certified to 6th Cir.* (E.D. Mich. May 19, 1977) (No. 77-8064).

> Conflicting inferences may be drawn from the legislative history accompanying the federal labor laws such that congressional intent is difficult to fathom. [Mem. and Order, p. 5]

Agreeing with Judge Owen "that the expectation of unemployment benefits is a significant factor in prolonging a strike", he granted the preliminary injunction there sought. *Id.*

2. *The Decision Below Raises Significant Questions of Federal Law Which Have Not Been, But Should Be, Settled Concerning the Application of This Court's Labor Law Preemption Doctrine to State Laws Granting Unemployment Compensation to Strikers.*

The precise questions posed herein have never previously been presented to this Court on a record remotely resembling the completeness with which this one reveals the substantial impact of the promise and grant of unemployment benefits on collective bargaining.[10]

The record facts in this case indicate an increasing resort by unions and their striking members to state-granted, but employer-financed, unemployment compensation benefits and the use of such benefits as a strike weapon to complement or replace the unions' own strike funds. This has in recent years produced a swelling volume of litigation in

[10] This Court summarily dismissed, for want of a substantial federal question, the appeal in *Kimbell, Inc.* v. *Employment Security Comm'n*, 429 U.S. 804 (1976), from a decision of the New Mexico courts upholding that state's payment of unemployment compensation to strikers in certain limited circumstances. That case involved a different statute and a minimal record on impact. The state court's decision on review, moreover, did not consider legislative intent. Both of the courts below distinguished *Kimbell* from the case at bar (7a n.2, 48a-53a).

federal and state courts across the country challenging the validity of such payments on the very grounds here asserted. Cases, in addition to the one at bar, which are now pending before the federal courts include *Grinnell, supra; Hawaiian Telco, supra;*[11] *Dow, supra; Shell Oil Co.* v. *Brooks*, No. C74-1935 (W.D. Wash.); *Otis Elevator Co.* v. *New York State Dep't of Labor*, 75 Civ. 6463 (S.D.N.Y.); *General Elec. Co.* v. *New York State Unemployment Ins. Fund*, Civil Action No. 75-602 (N.D.N.Y.); *Hawaii Employers Council* v. *State of Hawaii Dep't of Labor & Indus. Rel. (Pearl Harbor Fed. Credit Union)*, Civil No. 74-262 (D. Hawaii); *Hawaii Employers Council* v. *State of Hawaii Dep't of Labor & Indus. Rel. (Edward D. Sultan Co.)*, Civil No. 74-285 (D. Hawaii); *Westinghouse Broadcasting Co.* v. *Commonwealth of Massachusetts*, Civil Action No. 76-1409-S (D. Mass.); *American Broadcasting Cos., supra; Eagle Elec. Mfg. Co.* v. *New York State Dep't of Labor*, 77 Civ. 3925 (S.D.N.Y.); *Jarl Extrusions, Inc.* v. *Ross*, Civil Action No. 77-412 (W.D.N.Y.); *Ford Aerospace & Communications Corp.* v. *State of Hawaii Dep't of Labor & Indus. Rel.*, Civil No. 75-44 (D. Hawaii); *Mail-Well Envelope Co.* v. *State of Hawaii Dep't of Labor & Indus. Rel.*, Civil No. 75-131 (D. Hawaii); *Spargo Wire Co.* v. *New York State Unemployment Ins. Fund*, 77-Civ.-520 (N.D.N.Y.). The sheer volume of such litigation and the conflicts and confusion which the decision at bar has created call for review of the issues presented herein.

Both the importance of these questions and the fact that they have yet to be settled were highlighted by this Court

[11] We are advised that the employer in *Hawaiian Telco* (now pending before the Ninth Circuit) intends to file a petition for certiorari prior to circuit court determination in order that that case may be decided contemporaneously with the one at bar.

in its May 31, 1977, ruling in *Ohio Bureau of Employment Services* v. *Hodory,* 45 U.S.L.W. 4544, 4545 n.3 (No. 75-1707), which carefully and explicitly safeguarded for future determination the issue of whether Ohio's unemployment compensation law was in any way preempted by the National Labor Relations Act.[12]

The decision of the Court of Appeals here, if permitted to stand, would sanction the continuation of a proven and substantial interference with federal labor policy. Recent pronouncements by this Court have confirmed the vitality of the labor preemption doctrine and the Court's vigilance in furtherance of its protection has been manifested by its grant of review in important cases arising from attempts to circumvent or narrow the scope of that doctrine. *E.g., Lodge 76, IAM* v. *Wisconsin Employment Rel. Comm'n,* 427 U.S. 132 (1976) (state law making a concerted refusal to work overtime an unfair labor practice preempted); *Connell Constr. Co.* v. *Plumbers & Steamfitters Local 100,* 421 U.S. 616 (1975) (state antitrust law assuming to regulate certain union organizational activities preempted); *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers* v. *Austin,* 418 U.S. 264 (1974) (state libel law preempted insofar as it provided for remedies against union publication which was neither reckless nor contained a knowing falsehood); *Beasley* v. *Food Fair, Inc.,* 416 U.S. 653 (1974) (state "right-to-work" statute preempted because it "flout[ed] the national [labor] policy"); *White Motor Corp.* v. *Malone,* 545 F.2d 599 (8th Cir. 1976), *prob. juris. noted,* 46 U.S.L.W. 3214

[12] Subsequent to *Hodory,* this Court (albeit in a case involving welfare benefits for strikers) again noted, but expressly left open, the labor law preemption issue in *Batterton* v. *Francis,* 45 U.S.L.W. 4768, 4770 n.7 (U.S. June 21, 1977) (No. 75-1181).

(U.S. Oct. 3, 1977) (No. 76-1184); *Sears, Roebuck & Co.* v. *San Diego County Dist. Council of Carpenters,* 17 Cal. 3d 1893 (Cal. Sup. Ct. 1976), *cert. granted,* 45 U.S.L.W. 3586 (U.S. March 1, 1977) (No. 76-750). This petition requests review of just such a case.

3. *The Decision of the Court Below Is in Basic Conflict With Applicable Decisions of This Court and Casts Into Doubt and Uncertainty the Scope and Full Force of the Federal Labor Law Preemption Doctrine.*

(a) The Nash Case.

The opinion below places substantial and, indeed, almost controlling reliance on Congress' failure in the Social Security Act, now the Federal Unemployment Tax Act, expressly to forbid the payment of unemployment benefits to strikers. To the court below the unemployment insurance scheme devised by Congress, with the exception of the few standards specified therein, granted to the states all but total freedom to set up any unemployment compensation system they wished; and each state could "serve as a laboratory" and "try novel social and economic experiments without risk to the rest of the country" (11a).

That Congress wished to leave the question of benefits to strikers in the hands of local officials, held the Court of Appeals, may be inferred not only from the "fact that the matter has long been a political 'hot potato'",[13] but also because "the national interest can be served as well by individual State experimentation as by enforced national uniformity" (15a).

[13] This purely speculative explanation in a field where virtually every issue generates its own heat would, if adopted, invite ever-widening state incursions into the area of federal labor law.

But it is "enforced national uniformity" that was and remains the guiding rationale and motivating force underlying the federal labor laws. Indeed, this Court has recognized that the primary factor which led Congress to enact "a comprehensive national labor law" was

> the perceived incapacity of common-law courts and state legislatures, acting alone, to provide an informed and coherent basis for stabilizing labor relations conflicts and for equitably and delicately structuring the balance of power among competing forces so as to further the common good. [*Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 286 (1971)]

Senator Williams, Chairman of the Senate Labor Committee and the chief sponsor in the Senate of the most recent amendments to the NLRA concerning health care institutions, also recognized this factor during the debate on those amendments when he said:

> [T]he general purpose of the National Labor Relations Act, as interpreted by the Board and the courts, is to attempt to establish a uniform pattern of collective bargaining rules nationwide, without local variation. [120 Cong. Rec. 22575 (July 10, 1974)]

The national interest in labor relations—promoting labor peace—is not served by local "experimentation" but, as recognized both by Congress and by this Court, may be attained only through a uniform, comprehensive national labor policy. Thus, in finding paramount power in the states to subordinate the national labor policy to state-by-state decisions concerning the allowance of unemployment

insurance benefits to strikers, the decision below attributes to Congress an intent to permit frustration of its own basic purpose in enacting a comprehensive federal labor law.

To the contrary, this Court has declared and consistently applied the principle that any state law conflicting, directly or indirectly, with the policy of free collective bargaining embedded in the federal labor laws must be declared invalid under the Supremacy Clause of the United States Constitution. *See* Cox, *Labor Law Preemption Revisited,* 85 Harv.L.Rev. 1337 (1972), and cases cited therein. It has expressly ruled, moreover, that state unemployment insurance laws are not immune from the operation of the labor preemption doctrine and, accordingly, must yield to the federal superintendence in the labor field. *Nash* v. *Florida Indus. Comm'n,* 389 U.S. 235 (1967).

The opinion of the Court of Appeals in the case at bar significantly omitted any reference to this Court's opinion in *Nash.* And its inference of congressional tolerance of state unemployment insurance laws that conflict with the federal labor policy is in basic conflict with this Court's decision in that case.

In *Nash,* the Court found a violation of the Supremacy Clause in the labor dispute provision of the Florida Unemployment Compensation Law insofar as it denied benefits to a claimant because she filed an unfair labor practice charge with the National Labor Relations Board. The Court concluded that Florida's eligibility requirements in this regard "frustrated" the purposes of the national labor legislation and stood as an "obstacle" to their full accomplishment. 389 U.S. at 240.

As the National Labor Relations Board stated to this Court as an *amicus curiae* in *Nash* (Brief p. 7):

> Within broad limits [a state] is unquestionably free to prescribe the conditions upon which employees are entitled to receive the benefits of the State's unemployment compensation system. Nevertheless, a "state may not so deal with matters left to its control as to stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" • • • Thus, this Court has frequently set aside State regulatory schemes found to impair rights created by the National Labor Relations Act. See *Hill* v. *Florida*, 325 U.S. 538; *Auto Workers* v. *O'Brien*, 339 U.S. 454; *cf. San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236. And the conditions that a State may impose upon a grant of benefits are likewise subject to scrutiny to insure consistency with federal policy. *It is quite clear a State cannot condition the grant of benefits in a manner that undermines rights protected by the Constitution or frustrates federal legislation.* [Emphasis supplied]

The *Nash* decision stands foursquare against the single thread which runs through the Court of Appeals' opinion in this case, namely, that each state enjoys the unlimited and unrestricted right to establish any eligibility requirements for unemployment compensation it may wish, without regard to the federal labor policy. As this Court observed in *Nash*:

> A national system for the implementation of this country's labor policies is not so dependent on state law. [389 U.S. at 239]

(b) The Basic Conflict Between the Court of Appeals' Opinion and Both (1) This Court's Preemption Doctrine and (2) the Fundamental Rules of Statutory Construction Applied by This Court.

In the admitted absence of any "positive expression of congressional intent" on the subject of unemployment compensation for strikers, the court below attempted to construct such intent from unconnected and isolated items of so-called legislative history to support its ultimate conclusion of implied congressional authorization (7a-17a).[14] But these items, construed below as showing congressional inaction in the face of awareness[15] of the problem, do not support the conclusion there reached.

Congress has regulated and occupied the area of labor relations "to the full extent of its Constitutional power under the Commerce Clause," *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees* v. *Wisconsin Employment Rel. Bd.*, 340 U.S. 383, 391 (1951), and, accordingly, no state may enter into this area by legislation or other means which have a "tendency to frustrate" the operation of the federal scheme, *Nash* v. *Florida Indus. Comm'n*, 389 U.S.

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[14] The fallacy of drawing any inference concerning congressional intent from the specific items discussed by the court below is demonstrated by the First Circuit's opinion in *Grinnell, supra*.

[15] The finding of congressional awareness, we believe, is erroneous and will not stand closer scrutiny. It is unlikely that any of the legislative proposals, statements and reports relied upon to support that finding were ever brought to the attention of Congress as a whole. The Senate Report accompanying the Social Security Act, cited by the court below as indicating Congress' awareness and approval (10a-12a) of the striker benefit provision in New York's law, *does not contain any reference whatsoever to that provision*. Nor does the Report discuss or consider the problem of unemployment benefits for strikers, either in general or in the context of specific state laws.

at 239, *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468 (1955), or which "create a substantial risk of conflict with policies central to the federal labor law," [16] *Connell Constr. Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. at 636 (1975). *See also Lodge 76, IAM*, 427 U.S. at 146-47, and *Teamsters Local 20* v. *Morton*, 377 U.S. 252, 259-60 (1964).

Exceptions to the preemption doctrine have been permitted in labor cases only in the narrowest range of circumstances. These have been limited by this Court's decisions to cases where (1) the activity regulated by the state was "a merely peripheral concern" of the federal labor laws (*San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 243-44 (1959); *Lodge 76, IAM*, 427 U.S. at 136-37), (2) it "touched interests so deeply rooted in local feeling and responsibility that . . . [a court] could not infer that Congress had deprived the States of the power to act" (*id.*), or (3) Congress has *"affirmatively indicated"* that the states have the power to act (*Lockridge*, 403 U.S. at 297; emphasis supplied).[17]

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[16] The national policy promoting free collective bargaining, with the right to strike at its core, is just such a policy. *See, e.g., H.K. Porter Co.* v. *NLRB*, 397 U.S. 99, 108 (1970); *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees, Div. 1287* v. *Missouri*, 374 U.S. 74, 82 (1963); *NLRB* v. *American Nat'l Ins. Co.*, 343 U.S. 395, 401-03 (1952).

[17] As explained by Professor Cox in his most recent article on labor law preemption,

> [w]here the state law or rule of decision is based upon an accommodation of the special interests of employers, unions, employees, or the public in employee self-organization, collective bargaining, or labor disputes . . . the likelihood that its application . . . will upset the balance struck by Congress is so great as *to require exclusion of state law unless Congress has provided otherwise.* [Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1356 (1972); emphasis supplied]

Exempting state unemployment compensation statutes from the broad sweep of the federal labor laws (absent any "*positive* expression of congressional intent" [18]), as did the court below, turns upside down the long-standing presumption in favor of federal preemption of state laws which presume to accommodate the special interests of the parties in collective bargaining or labor disputes.

But the powerful labor preemption doctrine cannot so easily be swept aside. Certainly more than congressional silence[19] is necessary to condone state intrusion into an area this Court has found central to the national labor policy. *Lodge 76, IAM*, 427 U.S. at 149-51.

This Court has cautioned that the proponent of decisions such as that below, which proceed on the basis of a limitation by implication on the scope of established federal policy, "bears a heavy burden of persuasion," *Arnell* v. *United States*, 384 U.S. 158, 165-66 (1966), and cannot succeed unless legislative intent that is "clear and manifest" is demonstrated,[20] *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939). For it is a "cardinal principle of statutory

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[18] 7a; emphasis supplied.

[19] Legislative silence or inaction is a " 'poor beacon' to follow in construing a statute." 2A Sutherland, *Statutory Construction*, §49.10 at p. 261 (4th ed. 1973). "[C]ourts are properly chary of equating mere inaction with approval, in the absence of solid foundation for the inference of conscious ratification." *Duncan* v. *Railroad Retirement Bd.*, 375 F.2d 915, 919 (4th Cir. 1967). "If the failure of enactment of every amendment offered for consideration of Congress were necessarily held to shed light on the legislation sought to be amended, the search for Congressional intention would be endless and fruitless." *United States* v. *Guerlain, Inc.*, 155 F. Supp. 77, 82 (S.D.N.Y. 1957).

[20] The currency of this interpretive principle was reaffirmed but a few weeks ago in a labor case decided by the Court of Appeals for the District of Columbia. *Laborers' Local 1057* v. *NLRB*, 96 L.R.R.M. 3160 (D.C. Cir. Nov. 23, 1977).

construction" that altering or narrowing the scope of an enactment by implication is "not favored." *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 168-69 (1976), and cases cited therein; *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 155-58 (1976); *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 592-98 (1976); *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963). Both this caution and the principle it seeks to enforce went unheeded by the Court of Appeals in this case.

That Congress' inaction in the case at bar has spanned a period of over forty years does not increase its "probative value" as a guide to legislative intent as the Court of Appeals believed (16a). For the law on labor preemption is replete with examples of state laws preempted after the passage of extensive periods of time. The several state enactments preempted in *Garmon, supra*, ranged (at the time of this Court's decision in 1959) anywhere from 12[21] to 26[22] to 87[23] years of age. The preempted state laws nullified by this Court's decisions in *Lockridge, Morton* and *Weber, supra*, were Idaho's common law of contract, Ohio's common law of secondary boycotts and Missouri's common law of secondary boycotts, respectively. A 27-year old law was preempted by this Court in *Beasley* v. *Food Fair, Inc., supra*, and one of 16 years' vintage was nullified in *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees, Div. 1287* v. *Missouri*, 374 U.S. 74 (1963).[24]

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[21] California Labor Code §§1115-18.

[22] California Labor Code §923.

[23] California Civil Code §1708.

[24] The First Circuit struck down Massachusetts labor laws ranging from 22 to 52 years of age in *General Elec. Co.* v. *Callahan*, 294 F.2d 60 (1961), *cert. dismissed*, 369 U.S. 832 (1962). And in *Oil, Chem. & Atomic Wkers.* v. *Arkansas Louisiana Gas Co.*, 332 F.2d 64 (10th Cir. 1964), a federal court nullified a statute evidently 60 years old on labor preemption grounds.

The preoccupation of the opinion below with the passage of forty years since enactment of New York's statute it would seem blinded it to the perceptions which the trial record in this case yielded as to the extent of that statute's infringement upon modern-day collective bargaining.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Dated: New York, New York
January 4, 1978

Respectfully submitted,

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APPENDIX

Opinion of Thomas J. Meskill

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1553—September Term, 1976.

(Argued July 22, 1977 Decided November 9, 1977.)

Docket No. 77-7337

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, and EMPIRE CITY SUBWAY COMPANY (LIMITED),

Plaintiffs-Appellees,

v.

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, Industrial Commissioner of the New York State Department of Labor, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, and JAMES H. TULLY, JR., State Commissioner of Taxation & Finance,

Defendants-Appellants.

Before:

MESKILL, *Circuit Judge,*
BRYAN* and STEWART,** *District Judges.*

* Hon. Frederick vanPelt Bryan, of the Southern District of New York, sitting by designation.

** Hon. Charles E. Stewart, Jr., of the Southern District of New York, sitting by designation.

Appeal from a judgment and order of the United States District Court for the Southern District of New York, Richard Owen, *Judge,* declaring New York's Unemployment Insurance Law, to the extent that it provides for the payment of unemployment compensation to striking employees, to be unconstitutional, enjoining its enforcement and awarding monetary relief.

Reversed and remanded with instructions to dismiss the complaint.

Maria L. Marcus, Assistant Attorney General of the State of New York (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirshowitz, First Assistant Attorney General of the State of New York, Nicholas G. Garaufis, Assistant Attorney General of the State of New York, of counsel), *for Defendants-Appellants.*

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Elevator Constructors, AFL-CIO, as Amicus Curiae.

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Frank J. Donner, Robert Z. Lewis, James G. Mauro, Jr., New York, New York; Sipser, Weinstock, Harper, Dorn & Leibowitz, New York, New York; Eisner, Levy, Steel & Bellman, New York, New York; Winn Newman, Washington, D.C.; Cammer and Shapiro, New York, New York; Vladeck, Elias, Vladeck and Lewis, New York, New York; *for Amici Curiae: District 65, Distributive Workers of America; International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC; United Electrical, Radio and Machine Workers of America (UE); District 1199, National Union of Hospital & Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO; District 3, International Union of Electrical, Radio and Machine Workers of America; District Council 1707, Community and Social Agency Employees Union, American Federation of State and Municipal Employees, AFL-CIO; Furriers Joint Council of New York, AFL-CIO; Joint Board, Fur, Leather and Machine Workers Union, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO; Butcher District Coun-*

cil of New York, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO; International Brotherhood of Teamsters & Warehousemen, Brewery Delivery Employees Local #46; Local 101, Utility Division, Transportation Workers Union of America, AFL-CIO; Local 140, Bedding, Curtain and Drapery Workers Union, United Furniture Workers of America, AFL-CIO; Local 259, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America; Shopmen's Local 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO; Professional and Administrative Staff Association, Museum of Modern Art; United Store Workers Union, Retail, Wholesale and Department Store Union, AFL-CIO; Association of Legal Aid Attorneys, New York, New York; Legal Services Staff Association, New York, New York; Metropolitan Opera Orchestra Committee, New York, New York; United Optical Workers Union, Local 408, International Union of Electrical, Radio and Machine Workers of America, AFL-CIO; Architectural and Engineering Guild Local 66, American Federation of Technical Employees, AFL-CIO.

Nixon, Hargrave, Devans & Doyle, Rochester, New York (Eugene D. Ulterino, Gail A. Kreusch, Rochester, New York, of counsel), *for Amici Curiae in support of affirmance.*

MESKILL, *Circuit Judge:*

New York's Unemployment Insurance Law permits employees who are involved in a "strike, lockout, or other industrial controversy" to collect unemployment compensation after a waiting period of eight weeks. N.Y. Lab. Law §§ 590.9, 592.1 (McKinney 1977). The district court held this statute invalid under the supremacy clause, U.S. Const. art. VI, cl. 2, finding that it alters the balance in the collective bargaining relationship and therefore conflicts with the federal labor policy favoring the free play of economic forces in the collective bargaining process. 434 F.Supp. 810 (S.D.N.Y. 1977). We reverse.

Approximately seventy percent of the Bell System's[1] nonmanagement employees are represented by the Communications Workers of America, AFL-CIO ("CWA"). Prior to 1971, the longstanding collective bargaining format between members of the Bell System and the CWA was one of pattern-settlement. Under this format, the parties would select two Bell System companies with early contract expiration dates as pattern-setters. When an agreement was reached with the pattern-setters, it became the standard for settlement on national issues in the rest of the Bell System.

On April 30, 1971, the contracts of the chosen pattern-setters were due to expire. No agreement was reached, however, and those contracts, along with all other Bell System contracts that were due to expire, were mutually extended on a day-to-day basis. In June, the CWA Inter-

1 The parties have stipulated that the term "Bell System", for the purposes of this lawsuit, includes American Telephone and Telegraph Company ("AT&T"), the twenty-one principal telephone operating companies owned, in whole or in major part, by AT&T and such other companies as Western Electric Company ("Weco") and Bell Telephone Laboratories, Inc. ("Bell Labs"), as well as all of the plaintiffs-appellees, New York Telephone Company ("Telco"), Weco, AT&T, Long Lines Department ("Long Lines") and Empire City Subway Company (Limited) ("Empire").

national recommended a nationwide strike, which began on July 14. On July 18, an agreement in principle, subject to ratification by mail, was reached, and the CWA ordered all employees back to work on July 21. Despite the International's directive, roughly 38,000 CWA members employed by the New York Telephone Company ("Telco") remained on strike in New York. Western Electric Company ("Weco") employees and American Telephone & Telegraph Company, Long Lines Department ("Long Lines") employees also stayed off the job.

On August 14, 1971, the employees of all Bell System companies except Telco and Empire City Subway Company (Limited) ("Empire") ratified the contract. The strike continued in New York for seven months, until February, 1972. Weco and Long Lines employees respected the picket lines of the striking Telco and Empire employees. During the strike, $43,000,000 in unemployment insurance benefits was paid, at an average rate of $75 per week, to 29,000 Telco employees and charged to Telco's account; $5,000,000 in benefits was paid to 4,150 Weco employees; $500,000 in benefits was paid to 350 Long Lines employees; and $100,000 in benefits was paid to 125 Empire employees. Had the strike not been settled, these payments would have continued until July of 1972. New York's unemployment insurance system is financed entirely by employer contributions, so the cost of making these payments was borne by the struck employers.

In a preemption case such as this one, "the crucial inquiry [is] whether Congress intended [this field to] be unregulated because [it was] left 'to be controlled by the free play of economic forces.'" *Lodge 76, International Association of Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132, 140 (1976), *quoting NLRB* v. *Nash-Finch Co.*, 404 U.S. 138, 144 (1971). Accordingly,

we must examine congressional intent.[2] Those courts that have considered Congress' intent with respect to the payment of unemployment benefits to strikers have found it "ambiguous." *Grinnell Corp.* v. *Hackett*, 475 F.2d 449, 454-57 (1st Cir.), *cert. denied*, 414 U.S. 858 (1973); *Hawaiian Telephone Co.* v. *Hawaii Department of Labor & Industrial Relations*, 405 F.Supp. 275, 286 (D. Hawaii 1976). We do not agree. Here, as in most preemption cases, a positive expression of congressional intent is lacking, and the Court must resort to the drawing of inferences. In the instant case, the evidence upon which those inferences must be based is not "ambiguous" but is relatively one-sided.

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2 In *Kimbell, Inc.* v. *Employment Security Commission of New Mexico*, 429 U.S. 804 (1976), the Supreme Court dismissed, for want of a substantial question, an appeal which raised, *inter alia*, the question at issue here. *Kimbell, Inc.* v. *Employment Security Commission of New Mexico*, No. 10323 (N.M. Sup. Ct. Dec. 29, 1975), *rev'g, Albuquerque-Phoenix Express, Inc.* v. *Employment Security Commission of New Mexico*, 88 N.M. 596, 544 P.2d 1161 (1975). We must therefore decide whether, under the doctrine of *Hicks* v. *Miranda*, 422 U.S. 332 (1975), the *Kimbell* dismissal is controlling. *See generally* Comment, The Precedential Weight of a Dismissal by the Supreme Court for Want of a Substantial Federal Question: Some Implications of *Hicks* v. *Miranda*, 76 Colum. L. Rev. 508 (1976). We agree with the district court that it is not. *See also Dow Chem. Co.* v. *Taylor*, 428 F.Supp. 86 (E.D. Mich. 1977). The district court's view has been confirmed by subsequent indications from the Supreme Court itself. *Ohio Bureau of Employment Servs.* v. *Hodory*, 45 U.S.L.W. 4544, 4545 n.3 (May 31, 1977); *Batterton* v. *Francis*, 45 U.S.L.W. 4768, 4770 n.7 (June 20, 1977). We are aware of the contrary decision of the Third Circuit in *Super Tire Eng'ring Co.* v. *McCorkle*, 550 F.2d 903 (3d Cir.), *cert. filed*, 46 U.S.L.W. 3110 (U.S. Aug. 30, 1977), and we respectfully disagree with that Court. We note that *Super Tire* was decided prior to *Hodory* and *Batterton*.

In *Kimbell* the Solicitor General and the NLRB argued to the Supreme Court that "it is apparent that Congress over the years has been aware of the disparate attitudes in the states as to the advisability of allowing strikers access to unemployment benefits and has decided to permit the diversity to continue." Brief for the United States as Amicus Curiae at 8, *Kimbell, Inc.* v. *Employment Security Commission of New Mexico*, 429 U.S. 804 (1976).

The question whether striking workers should be entitled to benefit from various forms of social welfare legislation has been a significant political issue since the early 1930s. In *Grinnell,* the First Circuit considered congressional awareness of the issue prior to the enactment of the National Labor Relations Act and the Social Security Act:

> In July 1933, the Federal Emergency Relief Administration (FERA) ruled that it would not "attempt to judge the merits of labor disputes" but would treat unemployed strikers like all other unemployed persons for purposes of relief. Brown, Public Relief 1929-39, 270 (1940). This policy became a bone of contention during the textile strike of September 1934. Bernstein, The Turbulent Years: A History of the American Worker 1933-41 (1971). Congress could hardly have been unaware of this policy when in 1935 it passed in close succession both the National Labor Relations Act . . . and the Social Security Act . . . .

475 F.2d at 454. The National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (July 5, 1935), *as amended,* 29 U.S.C. § 151 *et seq.* ("NLRA"), makes no mention of unemployment compensation. On the other hand, Title IX of the Social Security Act, Pub. L. No. 74-271, §§ 901-910, 49 Stat. 639-45 (Aug. 14, 1935), which is now the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-09, was part of a legislative program "to stimulate the creation of and payment to State unemployment compensation funds." *United States* v. *Spencer,* 65 F.Supp. 763, 764 (D. Mass. 1946) (Wyzanski, *J.*), *aff'd in part, rev'd in part sub nom. Massachusetts* v. *United States,* 160 F.2d 614 (1st Cir. 1947), *aff'd,* 333 U.S. 611 (1948). It was designed to deal with the urgent national problem of unemployment. *See Steward Machine Co.* v. *Davis,* 301 U.S. 548, 586-88 (1937). This

was done by imposing a federal excise tax on employers, while giving a tax credit to those who made contributions to qualified State plans. In order for a State plan to qualify, the State's law had to meet certain requirements, including three designed "to insure the compatibility of state unemployment compensation laws with the then brand-new labor statute." *Grinnell, supra,* 475 F.2d at 454-55. Under the statute, a State law could not deny benefits to individuals who refused to accept new work for any of the following reasons:

> (A) If the position offered is vacant due directly to a strike, lockout, or other labor dispute;
>
> (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;
>
> (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization . . . .

Social Security Act § 903(a)(5), 49 Stat. 640, 26 U.S.C. § 3304(a)(5). The significance of this provision was considered in *Ohio Bureau of Employment Services* v. *Hodory,* 45 U.S.L.W. 4544 (U.S. May 31, 1977). In that case, the Supreme Court faced the question whether a State statute barring the payment of unemployment benefits to strikers was preempted by certain federal statutes.[3] The Court specifically examined the provisions quoted above and concluded:

> [W]hen Congress wished to impose or forbid a condition for compensation, it was able to do so in explicit

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3 The Supreme Court expressly declined to consider the preemptive effect of the NLRA on the statute at issue. 45 U.S.L.W. at 4545 n.3.

> terms. There are numerous examples, in addition to [26 U.S.C. § 3304(a)(5)], less related to labor disputes but showing a congressional ability to deal with specific aspects of state plans. The fact that Congress has chosen not to legislate on the subject of labor dispute disqualifications confirms our belief that neither the Social Security Act nor the Federal Unemployment Tax Act intended to restrict the States' freedom to legislate in this area.

Id. at 4549 (footnotes omitted).

The failure of Congress to forbid the payment of benefits to strikers takes on additional significance in light of the fact that it had been urged to do so. Hearings on S. 1130 before the Senate Comm. on Finance, 74th Cong., 1st Sess. 228 (1935) (Edmund Witte, Executive Director, President's Committee on Economic Security, recommendation on behalf of Advisory Council); *id.* at 472 (Dr. Abraham Epstein, American Association for Society Security, proposed draft of bill); *id.* at 959 (statement of Noel Sargent, National Association of Manufacturers). The Senate Committee Report stated:

> Except for a few standards which are necessary to render certain that the State unemployment compensation laws are genuine unemployment compensation acts and not merely relief measures, the States are left free to set up any unemployment compensation system they wish, without dictation from Washington.

S. Rep. No. 628, 74th Cong., 1st Sess. 13 (1935), *reprinted in* 1 Social Security: Documentary History of the Social Security Act of 1935 (1942); *see* H.R. Rep. No. 615, 74th Cong., 1st Sess. 8-9 (1935), *reprinted in* 1 Social Security: Documentary History of the Social Security Act of 1935

(1942). *See also, Hodory, supra,* 45 U.S.L.W. at 4547-48.[4] This expression of congressional intent to avoid excessive intrusion into local affairs is entirely consistent with the doubt that existed at that time concerning Congress' power to enact legislation of this character without encroaching to an unconstitutional degree on the powers of the States. In *Stewart Machine Co.* v. *Davis, supra,* for example, Justices McReynolds, Sutherland, Van Devanter and Butler dissented on Tenth Amendment grounds from the judgment upholding the Social Security Act. *Cf. National League of Cities* v. *Usery,* 426 U.S. 833 (1976). The New York statute, the Social Security Act and the NLRA were each born of an era which had not forgotten that "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co.* v. *Liebmann,* 285 U.S. 262, 311 (1932) (Brandeis, *J.*, dissenting).

Moreover, it is particularly noteworthy that Congress was aware of the New York statute when it enacted the NLRA and the Social Security Act. The New York statute had taken effect on April 25, 1935, two months before the NLRA and almost four months before the Social Security Act.[5] Indeed, the Senate Report to the Social Security

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4 An analysis of the Social Security Bill published in the New York Times on August 10, 1935, reported that, "[t]he bill allows the States the widest discretion in setting up their own requirements," and, again, that, "[t]he States have the widest possible latitude to set up their own unemployment compensation systems . . . ." N.Y. Times, Aug. 10, 1935, at 4, col. 2, *reprinted in* 79 Cong. Rec. 13079 (1935).

5 The public policy underlying New York's statute is stated in § 501 of the Labor Law:

> Public policy of state
>
> As a guide to the interpretation and application of this article, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health,

Act cited New York as one of the five States with a statute of the sort that Congress sought to encourage other States to enact. S. Rep. No. 628, *supra*, at 11. Within the next few years, the Social Security Board approved New York's statute, along with three others which authorized the payment of benefits to strikers. The Secretary of Labor, whose responsibility it now is to certify State laws on an annual

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welfare, and morale of the people of this state. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden, which now so often falls with crushing force upon the unemployed worker and his family. After searching examination of the effects of wide spread unemployment within the state, the joint legislative committee on unemployment appointed pursuant to a joint resolution adopted April ninth, nineteen hundred and thirty-one, reported to the legislature that "the problem of unemployment can better be met by the so-called compulsory unemployment insurance plan than it is now handled by the barren actualities of poor relief assistance backed by compulsory contribution through taxation. Once the facts are apprehended this conclusion is precipitated with the certainty of a chemical reaction." Taking into account the report of its own committee, together with facts tending to support it which are matters of common knowledge, the legislature therefore declares that in its considered judgment the public good and the well-being of the wage earners of this state require the enactment of this measure for the compulsory setting aside of financial reserves for the benefit of persons unemployed through no fault of their own.

N.Y. Lab. Law § 501 (McKinney 1977).

New York's provision of benefits to strikers after eight weeks represents a good faith attempt to strike a balance between neutrality in the collective bargaining process—which the State maintains for the first eight weeks—and the social and economic well-being of its citizens—an interest which lies well within its legislative powers. *W.H.H. Chamberlin, Inc.* v. *Andrews*, 159 Misc. 124, 286 N.Y.S. 242 (Sup. Ct. Onondaga County), *modified*, 271 N.Y. 1, 2 N.E.2d 22, *aff'd without opinion by an equally divided Court*, 299 U.S. 515 (1936).

Harold Kasper, the Director of the Unemployment Insurance Division of the New York Department of Labor, testified at trial that the three most important objectives of the statute were (1) to "cushion the economy" by keeping in circulation money which the strikers would ordinarily spend on food, housing and the like; (2) to aid the striker to pay essential expenses; and (3) to maintain a labor force for the struck employer until the strike is over.

basis, has consistently approved New York's law. The significance of this fact is limited, because they were required to approve all laws that met the minimum requirements of 29 U.S.C. § 3304(a). *Hawaiian Telephone Co., supra*, 405 F.Supp. at 285. Nevertheless, the Secretary's continuing review is relevant. Government administrators serve as conduits through which the executive and, eventually, the legislative branches obtain information concerning the operation of the laws for which the administrators are responsible. The greater the oversight, the more likely it is that Congress will be aware of State statutes which are or have become "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941) (footnote omitted).

The next opportunity Congress had to consider whether unemployment compensation should be paid to strikers was in 1947 when the House of Representatives considered and passed the Hartley Bill, which excluded striking employees who accepted unemployment compensation from the definition of "employee" under § 2(3) of the NLRA and thereby effectively denied them the protections of the Act. H.R. 3020, 80th Cong., 1st Sess. (1947), *reprinted in* 1 *NLRB, Legislative History of the Labor Management Relations Act, 1947* 158 (1948). The House Report stated that this was appropriate because the payment of such benefits was a "perversion" of the purposes of social security legislation. H.R. Rep. No. 245, 80th Cong., 1st Sess. 12 (1947), *reprinted in* 1 *NLRB, Legislative History of the Labor Management Relations Act, 1947* 303 (1948). The Minority Report argued that "[u]nder the Social Security Act . . . the determination of these matters was advisedly left to the States." *Id.* at 68 (Minority Report), *reprinted in* 1 *NLRB, Legislative History of the Labor Management Relations Act, 1947* 359 (1948). The Senate

Bill did not contain the exclusion, and the Senate version was accepted by the Conference Committee with little further discussion. Conf. Rep. No. 510, 80th Cong., 1st Sess. 32-35, *reprinted in* [1947] U.S. Code Cong. & Ad. News 1135, 1137-41; 1 *NLRB, Legislative History of the Labor Management Relations Act, 1947* 536-39 (1948); *see* Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, § 101, 61 Stat. 136 (1947).

In 1969 Congress again considered these matters. President Nixon sought legislation amending the Federal Unemployment Tax Act to include a "requirement that [the] practice of paying unemployment insurance benefits to workers directly engaged in a strike be discontinued." Message from the President, 115 Cong. Rec. 18538 (1969). The proposal was not adopted. Employment Security Amendments of 1970, Pub. L. No. 91-373, 84 Stat. 695 (1970). The reason for its rejection, as explained by Committee Chairman Mills on the floor of the House, was that:

> We have tried to keep from prohibiting the States from doing the things the States believe are in the best interest of their people. There are a lot of decisions in this whole program which are left to the States.
>
> For example, there are two States [New York and Rhode Island] which will pay unemployment benefits when employees are on strike, but only two out of 50 make that decision. That is their privilege to do so. They are taxing their employers within the State to pay unemployment benefits. If the legislature wants to do it, why not let them do it? I would not vote for it . . . but if the State wants to do it we believe they ought to be given latitude to enable them to write the program they want.

115 Cong. Rec. 34106 (1969).

Considering the fact that the matter has long been a political "hot potato," it is not at all surprising that Congress would wish to leave it in the hands of local officials. However, congressional intent need not be inferred from the possibility of political timidity; the national interest can be served as well by individual State experimentation as by enforced national uniformity. *See New State Ice Co. v. Liebmann, supra,* 285 U.S. at 311 (Brandeis, *J.*, dissenting).

As the Supreme Court noted in *Hodory, supra,* Congress has shown an ability to deal with specific aspects of State plans. 45 U.S.L.W. at 4549. In 1976, for example, Congress amended the Unemployment Tax Act to prohibit the payment of unemployment compensation to athletes during the off season, Act of Oct. 20, 1976, Pub. L. No. 94-566, § 314(a)(13), 90 Stat. 2667, 2680, 26 U.S.C. § 3304(a)(13), and to illegal aliens, *id.*, § 314(a)(14), 90 Stat. at 2680, 26 U.S.C. § 3304(a)(14). On the other hand, Congress prohibited the States from denying benefits on the basis of pregnancy. *Id.*, § 312(a)(12), 90 Stat. at 2679, 26 U.S.C. § 3304(a)(12).

In other contexts, Congress has itself afforded benefits to striking workers. The Railroad Unemployment Insurance Act, Pub. L. No. 75-722, 52 Stat. 1094 (1938), *as amended,* 45 U.S.C. § 351 *et seq.*, provides for the payment of benefits to those who participate in lawful strikes. *Id.* § 4(c), 52 Stat. at 1099, *as amended,* 45 U.S.C. § 354(a-2)(iii). The Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703, *as amended*, 7 U.S.C. § 2011 *et seq.*, was changed in 1971 to establish a set of uniform national standards of eligibility for food stamps, and expressly provides that strikers are not disqualified. Act. of Jan. 11, 1971, Pub. L. No. 91-671, § 4, 84 Stat. 2048, 2050, 7 U.S.C. § 2014(c). Finally, Congress has left the States free to determine whether benefits under the Aid to Fam-

ilies with Dependent Children program, 42 U.S.C. § 601 *et seq.*, may be denied to the children of strikers. *See Batterton* v. *Francis,* 45 U.S.L.W. 4768 (U.S. June 20, 1977).

We are aware of only one exception to the rule that Congress has either provided for benefits to strikers or left the matter to the States. In the unemployment laws of the District of Columbia, benefits are denied to strikers. However, this fact is of limited significance. "Because the District has no Congressional vote, Congress legislates for the District in a relative political vacuum . . . ." *Hawaiian Telephone Co., supra,* 405 F.Supp. at 285.

Our review of the relevant legislative history discloses no clear preemptive intent; indeed, virtually all the evidence is to the contrary. As mentioned above, the question whether striking employees should be afforded unemployment compensation has been a significant political issue since the early 1930s. In 1935, at a time when Congress sought to encourage the States to enact unemployment compensation statutes, New York was in the forefront, and its law granted compensation to strikers. For over forty years, Congress has been aware of the issue in general, and of New York's program in particular. "Congressional awareness, the availability of opportunities to act, and Congressional action in closely related matters," *Grinnell, supra,* 475 F.2d at 454, are all relevant in trying to determine Congress' intent, and all are present here. Moreover, their probative value increases over time. A long-standing practice "is not something to be lightly cast aside." *Walz* v. *Tax Commission,* 397 U.S. 664, 678 (1970). Accordingly, we hold that, notwithstanding the general rule that State statutes which touch or concern labor relations should be neutral, *Lodge 76, International Association of Machinists,* v. *Wisconsin Employment Relations Commission, supra,* 427 U.S. at 149-50, and despite the otherwise broad pre-

emptive scope of the federal labor laws, Congress has not expressed an intent to preempt State unemployment compensation laws that provide benefits to strikers. Quite to the contrary, it has evinced an intention to leave the States free to regulate in this area. Therefore, the conflict between New York's statute and the broad federal policy of free collective bargaining does not render the State statute unconstitutional. The conflict is one which Congress has decided to tolerate.

Several additional matters remain to be considered. In their fifth and sixth causes of action, the plaintiffs allege violations of the due process and equal protection clauses of the Fourteenth Amendment. In a memorandum denying the defendants' motion for summary judgment, Judge Owen expressed "substantial doubt that § 592.1 is so irrational as to be violative of" either of those clauses.[6] He reserved decision on the defendants' motion insofar as it related to these causes of action, pending the development of a full trial record. In a post-trial memorandum, plaintiffs argued that New York's statute impermissibly treated employers of striking employees in the same manner as employers of employees who were involuntarily unemployed. Plaintiffs relied primarily upon the decision of a three-judge district court in *Hodory* v. *Ohio Bureau of Employment Services,* 408 F.Supp. 1016 (N.D. Ohio 1976). Judge Owen, in his decision of May 23, 1977, did not reach the Fourteenth Amendment issue; his conclusion regarding the preemption issue made it unnecessary to do so. Under such circumstances, our reversal on the preemption issue would ordinarily require us to remand for further consideration of the Fourteenth Amendment issue. However, on May 31, 1977, the Supreme Court reversed the district court decision in *Hodory* and upheld, against an

6 See note 5, *supra.*

equal protection challenge, a State statute that did not pay benefits to strikers. The Court explained that "[t]he decision of the weight to be given the various effects of the statute [on employers and employees], however, is a legislative decision, and appellee's position is contrary to the principle that 'the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.'" 45 U.S.L.W. at 4549-50, *quoting Dandridge* v. *Williams,* 397 U.S. 471, 486 (1970). In view of *Hodory,* a remand for further consideration of the issue would be a futile gesture. Finally, we are as puzzled by the plaintiffs' allegation of a due process violation as the Supreme Court was of a similar allegation in *Hodory.* 45 U.S.L.W. at 4550. Plaintiffs have never alleged a violation of their right to procedural due process, and the question whether New York's statute violates an employer's substantive due process rights has been resolved by the Supreme Court. *W.H.H. Chamberlin, Inc.* v. *Andrews,* 159 Misc. 124, 286 N.Y.S. 242 (Sup.Ct. Onondaga County), *modified,* 271 N.Y. 1, 2 N.E.2d 22, *aff'd without opinion by an equally divided Court,* 299 U.S. 515 (1936).

Accordingly, the judgment of the district court is reversed, and the case is remanded with instructions to dismiss the complaint.

Declaratory Judgment and Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 4557

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, and EMPIRE CITY SUBWAY COMPANY (LIMITED),

Plaintiffs,

—against—

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, Industrial Commissioner of the New York State Department of Labor, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, and JAMES H. TULLY, JR., State Commissioner of Taxation and Finance,

Defendants.

DECLARATORY JUDGMENT AND ORDER FOR PERMANENT INJUNCTION

This action having come on for trial before the Court without a jury (Honorable Richard Owen, United States District Judge, presiding), the issues of liability having been duly tried and the Court, on May 23, 1977, after due deliberation, having rendered its Opinion and Order, containing its findings of fact and conclusions of law, and said Order and Opinion having been entered by the Clerk

of the United States District Court for the Southern District of New York on May 24, 1977,

Now, on motion of Aranow, Brodsky, Bohlinger, Benetar & Einhorn, attorneys for plaintiffs,

IT IS HEREBY ADJUDGED, ORDERED AND DECLARED, on the basis of the aforementioned findings of fact and conclusions of law, that Article 18 of the New York Labor Law ("the Unemployment Insurance Law"), to the extent it provides for the payment of unemployment compensation to strikers, is unconstitutional and void under the United States Constitution.

IT IS FURTHER ADJUDGED, ORDERED AND DECREED that, with respect to industrial controversies involving plaintiffs or any other employer engaged in interstate commerce or in an industry affecting interstate commerce as defined in the National Labor Relations Act and to related claims for unemployment compensation arising therefrom, defendants, their successors in office, agents, employees, and all other persons attempting or purporting to do so, are hereby permanently enjoined from (a) enforcing the New York State Unemployment Insurance Law to the extent that it provides for the payment of unemployment compensation to strikers, (b) authorizing the payment of unemployment compensation to strikers and (c) drawing vouchers on the accounts maintained to effectuate the payment of such compensation.

IT IS FURTHER ADJUDGED, ORDERED AND DECREED that defendants, their successors in office, agents, employees, or any other persons empowered to do so, shall, within eight

weeks after the entry of this Declaratory Judgment and Permanent Injunction, (a) recredit plaintiffs' respective unemployment insurance accounts, retroactive to the commencement of benefit payments to strikers in 1971, for the amounts paid out in unemployment compensation as a result of the 1971-1972 strike by the Communications Workers of America ("CWA") against plaintiffs, (b) accurately recompute plaintiffs' unemployment insurance normal tax rates for each and every year since 1971 in light of such credits, providing such computations to the Court and to plaintiffs, and (c) put into effect, retroactively to January 1, 1977, the 1977 normal tax rates as so computed.

The Court having requested the parties herein to stipulate, to the extent possible, the amount of unemployment insurance tax payments made by plaintiffs since January 1, 1972, in excess of such taxes as would have been due and payable if unemployment compensation had not been paid to strikers during the 1971-1972 CWA strike against plaintiffs,

IT IS FURTHER ADJUDGED, ORDERED AND DECREED that any questions not stipulated concerning the amount of said excess payments, recoupment of same, interest and costs shall be determined in a subsequent proceeding to be scheduled by the Court.

FURTHERMORE, the Court, expressly determining under Rule 54(b) F.R.Civ. P. that there is no just reason for delay in entering final judgment (except for the specific matters to be determined in a subsequent proceeding), as

Declaratory Judgment and Order

set forth hereinabove, hereby expressly directs the entry of such final judgment and the same hereby is entered.

So Ordered.

Dated: New York, New York
June 24, 1977

RICHARD OWEN
United States District Judge

Entered this 28 day of
June 1977.

RAYMOND F. BURGHARDT
Clerk

**Opinion of Richard Owen,
United States District Judge**

[434 F. Supp. 810]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. 73 Civ. 4557

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY LONG LINES DEPARTMENT, and EMPIRE CITY SUBWAY COMPANY (LIMITED),

Plaintiffs,

—v.—

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, Industrial Commissioner of the New York State Department of Labor, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, and JAMES H. TULLY, JR., State Commissioner of Taxation and Finance,

Defendants.

May 23, 1977

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Aranow, Brodsky, Bohlinger, Benetar & Einhorn by David L. Benetar, George E. Ashley, William P. Witman, Stanley Schair, Mark H. Leeds, New York City, for plaintiffs.

Louis J. Lefkowitz, Atty. Gen. by Maria L. Marcus, Stuart I. Greenberg, Ralph L. McMurry, Asst. Attys. Gen., Nicholas G. Garaufis, Deputy Asst. Atty. Gen., New York City, for defendants.

OWEN, District Judge.

In 1971 most employees of the entire nationwide Bell Telephone Company system (Bell System) went on strike. Within days, the strike was settled and there was a return to work at all units except those in New York State, where employees continued on strike for seven months. After the first eight weeks, many of the striking employees began receiving as much as $95.00 per week tax-free as unemployment compensation under New York law, which continued for the duration of the strike. By its conclusion, the strikers had received some $49,000,000 from the Compensation Fund and the New York Telephone Company (Telco) was faced with making up a $40,000,000 depletion in its credit in the said Fund.

The plaintiffs, New York State units of the Bell System, brought suit for the recovery of funds paid, to restore its lost credit position, and for a declaration that New York Labor Law § 500 *et seq.*, to the extent it mandates payment of unemployment compensation to strikers[1] is unconstitutional. By stipulation the liability issues were severed and separately tried.

The two principal questions raised on the non-jury trial before me are (1) whether the availability, receipt or expected receipt of unemployment insurance benefits for strikers under New York law exerts a significant impact on (a) collective bargaining and the demands and positions of the parties taken in connection therewith, (b) the incidence of strikes, (c) their duration or (d) the timing,

[1] A person laid off must wait basically one week before applying for benefits. A striker waits eight weeks.

nature and costs of collective bargaining settlements; and (2) has federal law preempted this field, requiring the state enactment to give way to federal policy.

Plaintiffs here, Telco, Western Electric Company (Weco), American Telephone & Telegraph Company Long Lines Department (Long Lines), and Empire City Subway Company (Limited) (Empire), are all part of the overall Bell System. Ninety per cent of the Bell System's non-management employees are members of unions, and seventy per cent are represented by the Communications Workers of America (CWA). For many years, the agreed-upon collective bargaining format between the union and the members of the Bell System was to select two Bell System companies with early contract expiration dates as the pattern-setters, one of them being an operating company with a bargaining unit of limited geographic scope, and the other being a bargaining unit with nationwide scope. National issues were the subject of bargaining in these pattern-setting negotiations, while local issues were to be negotiated separately with each unit. Once a pattern-making settlement was reached on a national basis, it became the standard for the settlement of national issues in all the other companies. Bargaining of local issues could then be concluded and complete contracts would be obtained.

In 1971, the pattern-setters chosen by CWA were Weco, as the nationwide bargaining unit, and the Chesapeake & Potomac Telephone Company, a multi-state bargaining unit of limited geographical scope. On April 30, 1971, the contracts with the two pattern-setters were due to expire. No agreement having been reached, the two contracts were

thereafter mutually extended on a day-to-day basis to July 14, 1971, as were other contracts with the Bell System that expired between April 30th and July 14th. On July 14, CWA began a nationwide strike against the Bell [813]
System involving some 500,000 employees, some whose contracts had expired, and some whose contracts, such as employees of Telco, Empire and Long Lines, had not yet expired. Four days later, agreements were reached among Bell System companies, including plaintiffs and CWA. These agreements covered both national and local items, the national items conforming to the national pattern. As soon as the agreements were reached, CWA called an end to the strike and directed a return to work on July 21st. With the single exception of the New York State bargaining units, the CWA-represented employees complied with this direction. However, approximately 38,000 members of the Telco unit continued on strike. Weco and Long Lines employees in New York State similarly stayed off the job. A ratification vote was scheduled and counting of the ballots was set for August 14th. CWA strongly endorsed ratification, and this was joined in by one Morton Bahr who, before, during and after the strike, was the top New York State CWA official. The results of the August 14th voting were that every CWA bargaining unit ratified the contract with the exception of the New York State units for Telco and Empire, and the strike was continued in New York.[2]

[2] Rhode Island (the only other state whose unemployment insurance statute parallels New York's law) employees represented by CWA were but a small part of two bargaining units within the New England Bell Telephone Company and, if they voted to reject their contracts, were obviously outvoted by the remainder of the employees in each of those two units who were employed in states which did not pay unemployment insurance benefits to strikers.

At the beginning of the strike, Telco made a decision not to settle, despite the prospect of a long strike, because the company had made an offer which had been approved and recommended by the international union, and which was in line with the pattern settlements ratified by the CWA membership throughout the rest of the country. Telco felt that the New York employees' tactics—endeavoring to break the pattern—could only lead to labor turmoil throughout the Bell System. After a number of months had passed, however, Telco saw that the strike would not end without some concession to union demands and, noting that employees were still eligible for six or more months of unemployment compensation, decided to settle along the lines recommended by the federal mediator. In addition to the fact that unemployment insurance payments would continue, there was pressure from the business community to restore normal operations and make backlogged installations of new equipment. Telco's New York unemployment insurance account was approaching a negative balance, having dropped from a pre-strike credit of more than $40,000,000. Finally, some businesses, in addition to complaining about lack of service, would have had to share in the cost of paying strike benefits if Telco's unemployment insurance fund went into negative balance. These factors caused Telco to submit to a break in the national pattern.[3]

[3] Notwithstanding the break in the pattern (and, I note, the enormous cost to all parties and the public as well), CWA officer

During the seven months of the strike, the striking workers, after their wait of eight weeks, had received $49,000,000 in unemployment compensation benefits which were charged against Telco. Telco's unemployment compensation fund had been depleted by $40,000,000, which it was required to replace.[4] I note that the strike was thereafter declared illegal by the National Labor Relations Board.[5]

Notwithstanding the State's adamant position to the contrary, I regard it as a fundamental truism that the avail-

[814]

ability to, or expectation or receipt of a substantial weekly tax-free payment of money[6] by, a striker is a substantial factor affecting his willingness to go on strike or, once on strike, to remain on strike, in the pursuit of desired goals.[7] This being a truism, one therefore would expect to find confirmation of it everywhere. One does.

Morton Bahr, writing after the strike, obviously had mixed feelings about the outcome, for he stated:

> "The amount of additional wage benefits is anything but impressive. However, it broke the [Bell] System's long standing policy . . . . So, while the amount of money was small, the accomplishment and impact on the future is significant."

[4] It was assessed and had paid $6,000,000 in 1974 and $9,000,000 in 1975.

[5] 208 N.L.R.B. 267 (1973).

[6] The average here was $75.00; the highest $95.00.

[7] I note that even as to welfare payments, for which one on strike must make a showing of "need," Justice Blackmun, in *Super Tire Engineering Co.* v. *McCorkle,* 416 U.S. 115, 94 S.Ct. 1694, 40 L.Ed. 2d 1 (1974) stated:

> "It cannot be doubted that the availability of state welfare assistance for striking workers in New Jersey pervades every work stoppage, affects every existing collective-bargaining agreement, and is a factor lurking in the background of every incipient labor contract." *Id.* at 124, 94 S.Ct. at 1699.

Turning first to the union's contemporaneous view of the effect unemployment insurance had upon its ability to maintain this strike, particularly appropriate is a letter written by Morton Bahr, Vice President of CWA charged with administering all the union's affairs in New York, New Jersey and New England. He wrote to the New York CWA employees shortly after the strike was over:

> "The fact that more than 80% of the membership stood together for 218 days is simply incredible. In my judgment, it is a testimonial to three phenomena:
>
> 1. Dedication and support by the strikers
> 2. Unemployment insurance
> 3. Effectiveness of CWA's defense fund."[8]

During the course of the strike, the following appeared in the *New York Generator,* a CWA newspaper:

> "In an attempt to undermine any future strike effort, New York Telephone has filed a suit in Manhattan Federal Court to prevent strikers from collecting unemployment benefits.
>
> • • • • •
>
> "New York Tel. would do well to pay the [unemployment insurance] fund what it owes and commence preparation for our next contract, and incidentally, better wages and benefits, instead of looking for ways to sabotage our strike weapon even before we utilize it."

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[8] Mr. Bahr testified before me some four years after writing this letter that it had other than its plain meaning. I reject that self-serving explanation made at the trial.

In November 1971, during the course of the strike, Bahr wrote a letter to the local president in which he declared:

> "The strike against the New York Telephone Company enters the 18th week today. The stamina and spirit of our members in New York Tel and those respecting picket lines in Western Electric and Long Lines, is simply amazing. More than 89% of the New York Plant employees are still on the bricks.
>
> "*New York State Unemployment Compensation is a tremendous assist to our members.* In addition, the CWA Defense Fund is taking care of the necessary payments for shelter and installment payments for cars and appliances where repossession is threatened." [Emphasis supplied.]

In December 1971, CWA Local 1102 in a recorded telephone message issued a threat to a legislator who proposed repeal of the law granting unemployment insurance to strikers. The message, as monitored, read in part as follows:

> "According to the Staten Island Advance on Friday, December 3rd, our councilman Frank Deondelulo introduced a resolution which asks the State Legislature to repeal the law enabling strikers to obtain unemployment insurance. This ex-dentist who finds he has all the qualifications for public office is certainly alienating labor and will find this out when he tries for reelection."

At the outset of the strike, CWA expended monies from its own defense fund but shortly thereafter stated:

> "No food assistance is to be given after September 7, 1971 since the members will have other income—
>
> [815]
>
> which will average $75.00 per week from the New York State Unemployment Compensation."

Following the strike, in April 1973, in a recorded telephone message to its members, CWA Local 1103 in Westchester urged them to write to a local state legislator, saying:

> "If we did not get [unemployment insurance] aid during the big strike of 1971 and 1972, I don't know where we would be right now."

Nor is there any question that CWA has always regarded money, regardless of source, as essential to success in a strike. In stating why it had established its defense fund, CWA stated in its Report of the Defense Fund Committee in 1952:

> "It was recognized that, regardless of every other consideration, the Union could not hope to survive unhurt in time of stress without an adequate defense fund.
>
> "The experience of every union that has ever joined battle with its bargaining adversary in a show of economic strength proves that a war chest, under one name or another, is an absolute must.
>
> • • • • •
>
> "The Defense Fund is a tool. It is one of the bargaining tools, similar to such a bargaining tool as statistics which are gathered by the Research Department, and it cannot do a job unless it is held in the proper hands."

CWA further enunciated this view of the importance of money in a strike in an issue of CWA News just before the strike in this case. The article, "Strike Survival," posed the question, "How do you survive a strike when the money stops coming in and the bills continue to mount and you still have to feed and clothe the children?"

While I need not place weight upon the following in reaching my conclusion, it is appropriate to note further support for the truth of the premise in union comment in other strike situations. In the Rochester Telephone Company strike in 1974-1975, CWA Local 1170 exhorted its members by way of a recorded telephone message as follows:

> "[T]he members of Local 1170, C.W.A., will march ten feet tall right through the holiday season and into unemployment insurance."

In a 1960 strike involving the United Steelworkers of America, the union answered strikers' questions concerning when they could "start drawing unemployment insurance" by advertising in a Syracuse newspaper that "in just 18 days, you will all be eligible for unemployment insurance."

In an International Union of Electrical Workers meeting in Cleveland, Ohio, at the taking of a vote to end a nationwide strike involving General Electric, the union official chairing the meeting stated as follows:[9]

> "All I know is that Schenectady [New York] voted today 5 to 3 to stay out and you know the reason why.
>
> • • • • •

[9] The evidence of this was a motion picture film received and exhibited on the trial.

> "Because they're getting $65 a week in unemployment compensation."

During the same General Electric strike, the following appeared in December 1969 in a Schenectady newspaper:

> "WORKERS FOREGO STRIKE BENEFITS
>
> "SCHENECTADY (UPI)—Members of one of the largest union locals in the General Electric Co. strike voted Monday to transfer their strike benefits to workers in other states while they collect New York unemployment checks, according to union officials.
>
> "Joseph Mangino, business agent for the 12,500 members of Local 301, International Union of Electric Workers, said the 'solidarity' vote came at an 'overflow' local meeting as the GE strike entered its eighth week.
>
> "Because the strikers in New York State are now eligible for state unemployment payments, Mangino said, they voted to send the $12 weekly per man in union strike benefits to strikers in other states who do not receive [816] unemployment checks."

Looking further, one continues to discover facts in conformity with the premised truism. Plaintiffs, following the suggestions in *Grinnell Corp.* v. *Hackett,* 475 F.2d 449 (1st Cir.), *cert. denied,* 414 U.S. 858, 879, 94 S.Ct. 59, 164, 38 L.Ed.2d 108, 124 (1973), engaged Dr. Gerald J. Glasser to do an attitudinal survey.[10] Dr. Glasser, experienced in his field, testified that:

[10] *Grinnell* suggests that:

> "[A] . . . representative and sophisticated sampling of experience and attitude directed at the effect of the actual or ex-

> "[A]ttitudes reflect prospective behavior of individuals . . . .
>
> "[T]he attitudes of a group of individuals, like employees, is of some interest and concern to other people, in this particular case, management and labor leaders. So it is important to know attitudes and opinions here for their impact on third parties . . . ."

Dr. Glasser's attitudinal survey, professionally done, was indeed helpful. It was based on random digit dialing and covered 600 union members and 600 non-union members. The results showed a predominant feeling among both union and non-union workers that because of unemployment insurance in New York State unions can achieve better strike settlements, since unemployment insurance enables strikers to hold out longer. Less predominant, but still shared by one-half of the union and non-union workers who expressed an opinion, was the strong belief that unemployment insurance forced management to settle more quickly. A majority of the union members surveyed ranked unemployment compensation as the first resource they would turn to in a strike, above welfare, food stamps and their union's own strike funds.

Plaintiffs, in further accordance with *Grinnell*,[11] proffered Dr. Lewis J. Perl, who had done a statistical com-

pected receipt of delayed unemployment benefits might be helpful to a court seeking to decide the relevant question of infringement." 475 F.2d at 459.

[11] *Grinnell* called for:

> ". . . statistical comparisons of the length and cost of strikes in states granting unemployment benefits (Rhode Island and New York) and the length and cost of strikes of similar size

parison using the United States Bureau of Labor Statistics figures for the ten year period from 1965 through 1974 to test the hypothesis that the payment of unemployment compensation to strikers influences the collective bargaining process by increasing the *number* of strikes settled within eight weeks and the *duration* of strikes that continued beyond that period. Dr. Perl's hypothesis was grounded in the belief that compensation influences both parties to the collective bargaining process but in opposite directions. In his view, payment of benefits reduces the cost to workers of strikes lasting more than eight weeks, with the consequence that they are somewhat more aggressive than they would be in their demands and able to tolerate a longer strike. On the other hand, Dr. Perl hypothesized that the payment of these benefits increases the cost to employers when a strike goes beyond the eight week period, not only because of the increased cost of the unemployment insurance taxes themselves, but also because the employer is likely to anticipate an increase in the resistivity of his employees and therefore conclude that if the strike does last more than eight weeks, then he will either have to tolerate a very long strike or settle on terms less favorable to himself than originally contemplated. Thus, an employer would be less willing to see a strike occur in the first place, would

in similar industries in other states not granting such benefits. . . . Their weight would depend on the extent to which they considered and controlled for other factors potentially responsible for any disparities—such as the size and nature of the industry, the length and strength of union representation, past labor-management relations and prior strike history, the relative wage and benefit structure under the expiring agreement, and local cost-of-living or other economic or structural peculiarities." 475 F.2d at 459.

be particularly anxious to prevent a strike from lasting more than eight weeks, and might increase settlement offers to avoid either possibility. In sum, therefore, Perl hypothe-
[817]
sized that one might expect the statistics to show an increase in New York in the proportion of strikes settled in the initial eight week period, on the one hand, and an increase in the duration of strikes lasting longer than that on the other. Perl's hypothesis was indeed supported.

Perl's analysis of the Department of Labor statistics reveals that strikes of more than eight weeks last two to four weeks longer in New York State than in states other than New York and Rhode Island,[12] while a greater percentage of strikes are settled in eight weeks or less in New York than in states other than New York and Rhode Island. Applying the settlement rate for the rest of the country to New York State, Perl concluded that 933,000 fewer man-days would be lost in New York each year were the national settlement rate to prevail here, which would constitute a 15% reduction in man-days lost due to strikes in New York.

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[12] In order to utilize the statistics effectively, Perl lumped New York and Rhode Island—the two states having essentially identical statutes—together. The data for Rhode Island showed no statistically significant differences from the data elsewhere, but the small number of observations available from the Rhode Island data made it impossible to draw any conclusions therefrom with any confidence. In addition, it is clear that where regional or nationwide strikes are involved, any determination as to Rhode Island is frequently made by the larger part of the bargaining unit that is in other states (see *supra* note 2) and, in any event, Rhode Island's small population tends to diminish the statistical value of its own figures.

Finally, plaintiffs called Dr. Jules Backman, an acknowledged expert in the field of collective bargaining, to give an overview. Backman, too, saw the availability and payment of unemployment insurance benefits as affecting the duration of strikes in opposite directions. Under some circumstances, he felt, the awareness that the staying power of the union would be increased, while at the same time anticipating a rise in their unemployment insurance tax, would induce some employers to settle earlier, out of concern for what may happen after the eight week suspension period. Thus, he concluded, unemployment insurance could increase somewhat the incidence of earlier settlements. However, as the strike passed the eighth week, he saw the position becoming "dramatically one-sided," for (1) the employee comes into receipt of funds adequate or almost adequate to meet essential needs, thereby increasing staying power, (2) the union's willingness to make concessions is reduced because one of its duties, providing resources to meet the needs of strikers, has been met and will continue to be met for as much as a year, and (3) the employer, on the other hand, sees his striking employee being subsidized while he, the employer, is in effect financing the subsidy out of his unemployment insurance taxes.

The State called several expert witnesses in an endeavor to dispute the "truism." The essence of these witnesses' testimony was that (a) it is issues that are in dispute between the parties that cause strikes; unemployment compensation is not a factor in determining whether to strike or maintain a strike once it is underway; and (b) in any event, plaintiffs have not proved that it *was* a factor. Often, in the course of their testimony, however, they ended up

supporting plaintiffs' position.[13] To the extent their testi-
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mony was in real or apparent conflict, I reject it.

While immaterial to the conclusions reached herein, I deem it appropriate to comment on the claimed interest of the State of New York in paying unemployment insurance benefits to strikers, which proof was offered by the State. Dr. Herman Gray testified that he had been a member of the Legislative Advisory Committee in 1934-1935, assisting in drafting the State's Unemployment Insurance Law. He thereafter served as Chairman and as public member of

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[13] For example, Dr. Mason Haire testified:

"THE COURT: How would you assess that factor, Doctor?

"A. If management thinks the payment of unemployment insurance will enable the workers to hold out longer, how would I assess that factor? Is that the question?

"THE COURT: In their bargaining stance.

"THE WITNESS: If management is convinced that that is true, I think they might change their bargaining position. Whether or not it is true—I think it is characteristic of all of us, if we think something is true, we think there is a burglar under the bed."

Dr. James Kuhn testified:

"Q. [N]ow I want to ask you a question, Dr. Kuhn: If a union believes that strike power is enhanced by unemployment insurance, and so expresses itself, in your opinion, if they believe that, is unemployment insurance exerting some influence in the bargaining situation?

"A. I do not see how one can say, Mr. Benetar, unless you know the influence of other factors, because this psychological factor may be offset by others.

"Q. I didn't ask you to weight the factors. I understand there is more than one factor in bargaining.

"THE COURT: Well, I think Dr. Kuhn has said yes, it's a question of what happens to that factor, that is all he's saying. He says yes, it is a factor. All right."

the State's Unemployment Insurance Advisory Committee. His professional activities over the years were mainly in the capacity of teacher, arbitrator and lawyer. It was his testimony that while the drafters of the law were principally concerned with "involuntary unemployment, and a man who is on strike cannot be said to be involuntarily unemployed," there were other concerns as well. One was with the ability of future administrators, at that time (1935) viewed as being too unschooled in the complexity of labor disputes, to determine whether a labor dispute involved a strike or lockout or whether a particular claimant was a striker, locked-out employee, sympathy striker refusing to cross a picket line, or otherwise affected by the dispute.[14] The result of this concern for efficiency in administration was a compromise under which all employees who became so unemployed were to be lumped together and treated alike and all such claimants were to serve an identical (10 weeks) waiting period and thereafter all were to receive full benefits. Thus, the avowed purpose of the New York Labor Law[15] was subverted for the purpose of mere administrative convenience. Dr. Gray regretted this result later when, as the Chairman of the New York State Unem-

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[14] It was also felt at that time that this would be an insignificant problem.

[15] § 501 provides in pertinent part:

". . . the legislature therefore declares that in its considered judgment the public good and the well-being of the wage earners of this state require the enactment of this measure for the compulsory setting aside of financial reserves *for the benefit of persons unemployed through no fault of their own.*" (Emphasis supplied).

ployment Advisory Committee, he wrote in 1946, recommending that benefits *not* be paid to strikers, as follows:[16]

> "The present provision of the law which permits the workers who voluntarily become unemployed because of a strike to receive benefits during the pendency of the strike runs counter to the objective of the law which 'compels our setting aside of financial reserves for the benefit of persons unemployed through no fault of their own.'"

Gray concluded his testimony before me with the concession that in his judgment unemployment insurance does have an impact on strikes.

> "Q. . . . 'Unemployment insurance benefits as such [Gray had written in 1946] should not be used as an instrument for either party involved in a labor dispute.'
>
> "A. Right. You show me how to avoid it. If I knew a way of avoiding it, I would have proposed it a long time ago."

The other witness called by the State on this subject was Unemployment Insurance Director Harold Kasper, currently Director of New York State Unemployment Insurance Division. Kasper contended that in his opinion the State maintained a neutral position for somewhere between 8 and 11 weeks (depending upon the length of administrative delay in commencement of benefits), saying:

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[16] Gray noted $2.5 million in benefits paid to 51,000 strikers in 1946 alone.

> "The State has assumed a neutrality for eight weeks and stood aside, so to speak, hands off, because it has been our experience that most strikes have been settled in that time."

[819]

Thereafter, Kasper testified, the State intervenes to aid strikers[17] through benefit payments chargeable against their struck employer. Kasper noted that as for the law's requirement that the striker seek other employment for entitlement of benefits, he conceded that little effort is made by the State to enforce this requirement, stating that, in his opinion, part of the objective of the law is to keep an employer's labor force intact during a strike.

Kasper's testimony concerning the actual operation of the law confirmed the conclusion that, certainly today, it is administrative *convenience* and not administrative *inability* that is being offered here by defendants as a justification for the New York approach. Kasper testified in detail on the elaborate quasi-judicial hearing procedure, established and operating under the New York law, which provides for hearings before full-time impartial referees (all of whom are attorneys) in which claimants may be represented by counsel and witnesses are examined and cross-examined under oath. A verbatim stenographic record is produced, briefs may be submitted and appeals as of right may be

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[17] "Q. . . . an objective of the statute is to aid strikers to pay their essential expenses when the strike exceeds eight weeks?
"A. Yes . . . .
"Q. You say that one of the objectives was to maintain a labor force for employers, is that right?
"A. That is correct."

taken, first to a five member Appeal Board and thereafter to the state courts. As noted by Kasper, Unemployment Insurance Referees are sometimes called upon to resolve subtle and hotly contested questions of fact (e.g., whether an employee has been discharged because of his race). Moreover, administrative *ability* does exist, for 48 states have statutes, some in being as long as New York's, under which determinations as to type of labor dispute and/or status of the claimant are regularly made, as Dr. Gray, one of the New York statute drafters, now recognizes.

Being confirmed in my judgment that unemployment compensation *does* have an impact on strikes, and concluding that the State's interest in its payment is not of such consequence as to be a factor in the Court's determination here, I turn to what I regard as the only issue before me at this time—that is, whether the New York State Labor Law, to the extent it provides for payment of unemployment compensation to strikers, is in conflict, directly or indirectly, with the policy of free collective bargaining established in the federal labor laws and is therefore invalid under the supremacy clause of the United States Constitution.[18]

The principle of labor law preemption "was born of [the Supreme] Court's efforts, without the aid of explicit congressional guidance, to delimit state and federal judicial authority over labor disputes . . . ." *Amalgamated Association of Street Employees* v. *Lockridge,* 403 U.S. 274, 286, 91 S.Ct. 1909, 1918, 29 L.Ed.2d 473 (1971). Congress has

[18] U.S.Const. art. VI, cl. 2, provides: "the Laws of the United States . . . shall be the supreme Law of the Land; . . . any Thing in the . . . Laws of any State to the Contrary notwithstanding."

regulated and occupied the area of labor relations "to the full extent of its constitutional power under the Commerce Clause." *Amalgamated Association of Street Employees* v. *Wisconsin Employment Relations Board,* 340 U.S. 383, 391, 71 S.Ct. 359, 363, 95 L.Ed. 364 (1951). The primary factor which led Congress to enact

> "a comprehensive national labor law . . . was the perceived incapacity of commonlaw courts and state legislatures, acting alone, to provide an informed and coherent basis for stabilizing labor relations conflict and for equitably and delicately structuring *the balance of power among competing forces* so as to further the common good." *Lockridge,* 403 U.S. at 286, 91 S.Ct. at 1917-1918 (emphasis supplied).

This view has been most recently reaffirmed in *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100,* 421 U.S. 616, 95 S.Ct. 1830, 44 L.Ed.2d 418 (1975); *accord, Old Do-*

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minion Branch No. 496, National Association of Letter Carriers v. *Austin,* 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974); *Beasley* v. *Food Fair, Inc.,* 416 U.S. 653, 94 S.Ct. 2023, 40 L.Ed.2d 443 (1974).

Free collective bargaining, under federal labor policy, is premised on the concept of government non-interference and neutrality. While the government "acts to oversee and referee the process of collective bargaining," it leaves "the results of the contest to the bargaining strengths of the parties." *H. K. Porter Co.* v. *NLRB,* 397 U.S. 99, 108, 90 S.Ct. 821, 826, 25 L.Ed.2d 146 (1970). The right to bargain

collectively clearly contemplates economic warfare and "does not entail any 'right' to insist on one's position free from economic disadvantage." *American Ship Building Co.* v. *NLRB,* 380 U.S. 300, 309, 85 S.Ct. 955, 962, 13 L.Ed.2d 855 (1965). As a practical matter, the use or availability of economic force was intended to be a factor in reaching agreement in collective bargaining. In *NLRB* v. *Insurance Agents' International Union,* 361 U.S. 477, 489, 80 S.Ct. 419, 427, 4 L.Ed.2d 454 (1960), the Court stated:

> "The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. Abstract logical analysis might find inconsistency between the command of the statute to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons . . . to induce one party to come to the terms desired by the other. But the truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors—necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exist side by side. One writer recognizes this by describing economic force as 'a prime motive power for agreements in free collective bargaining.'" (Citations omitted).

This position was reiterated in *NLRB* v. *Burns International Security Services, Inc.,* 406 U.S. 272, 288, 92 S.Ct. 1571, 1582, 32 L.Ed.2d 61 (1972), where the Court stated that:

> "The congressional policy manifest in the Act [NLRA] is . . . to allow the balance of bargaining advantage to be set by economic power realities."

In *Teamsters Local 20* v. *Morton,* 377 U.S. 252, 84 S.Ct. 1253, 12 L.Ed.2d 280 (1964), the Court, in passing upon Ohio common law governing secondary pressures during a labor dispute, an area not specifically covered by federal enactment, also held the field to be preempted.[19]

The clear teaching of the foregoing is that any state activity that "creates a substantial risk of conflict with policies central to federal labor law" is preempted and barred.[20] The New York Unemployment Insurance Law, as applicable to strikers, is just such state activity.

Supportive of this conclusion are reported decisions involving attacks on other state enactments providing for unemployment compensation payments to strikers. In *Grinnell Corp.* v. *Hackett,* 475 F.2d 449 (1st Cir. 1973), *cert. denied,* 414 U.S. 858, 879, 94 S.Ct. 59, 164, 38 L.Ed.2d 108, 124 (1973), the court reversed the dismissal of the

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[19] "If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe . . . the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy. 'For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.'" *Morton,* 377 U.S. at 259-60, 84 S.Ct. at 1258, *quoting Garner* v. *Teamsters Union,* 346 U.S. 485, 500, 74 S.Ct. 161, 98 L.Ed. 228 (1953).

[20] *Connell,* 421 U.S. at 636, 95 S.Ct. at 1841.

complaint which had alleged the unconstitutionality of Rhode Island's statute. In *Hawaiian Telephone Co.* v. [821] *Hawaii Dept. of Labor,* 405 F.Supp. 275 (D. Hawaii 1975), the court found federal preemption after a trial on the merits. In *Dow Chemical Co.* v. *Taylor,* 57 F.R.D. 105 (E.D. Mich. 1972), motion to dismiss the complaint was denied.

The State, in urging an absence of preemption, directs my attention to cases involving welfare payments to strikers and their families. Principal among these is *Super Tire Engineering Co.* v. *McCorkle,* 416 U.S. 115, 94 S.Ct. 1694, 40 L.Ed.2d 1 (1974). However, the problems sought to be remedied by unemployment compensation and welfare, and therefore the state's interests, are not identical. As aptly expressed in *Grinnell,* 475 U.S. F.2d at 459-60:

> "Welfare payments, premised on a finding of need, are directed at alleviating real hardship—serious threats to the physical well-being, indeed in some cases, survival, of individuals. Unemployment benefits in contrast, are conditioned on a certain minimal amount of prior employment and earnings in a specified period . . . . The amount of assets on hand or the nature of individual or family need are irrelevant. The state interest would then appear to be . . . the avoidance of 'economic insecurity,' or put another way, insurance against the temporary disruption of a flow of income.
>
> "Indeed, as to unemployment compensation for strikers, the state interest would appear somewhat narrower."

Given the foregoing observations, the welfare cases are clearly distinguishable.[21]

Both the State and the plaintiffs direct my attention to the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.,* but obviously for different reasons. The Railroad Unemployment Insurance Act grants benefits to strikers unless the Railroad Retirement Board finds that the strike was commenced in violation of the Railway Labor Act or of the established rules and practices of a bona fide labor organization, of which the striker is a member. From this, the State urges that obviously Congress recognizes that the *prospect* of unemployment compensation is not a factor in collective bargaining and, by analogy, the same Congressional attitude should be applied to the claimed conflict between the NLRA and New York Unemployment Insurance provisions. The plaintiffs, on the other hand, urge the conclusion that when Congress intended to permit compensation to strikers, it specifically provided for it and did so only in a unique situation[22] where elaborate statutory machinery provides for substantial government intervention in the *entire* strike process, including mediation, arbitration and the confirmation of emergency boards, rather than the free collective

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[21] I note that whereas *Grinnell* suggests that the court should engage in a balancing of federal and state interests, the court in *Hawaiian Telephone Co.* rejected a balancing test, stating that the court's duty was merely to inquire as to whether there was a conflict between the statutes. I conclude I need not reach the question of whether a balancing test is required. However, even if such a test were required, I would hold the federal interest superior to the state interest herein, which is at best one of administrative convenience.

[22] Obviously, a major railroad strike can have a far greater effect on the nation's economic health than any industrial strike, no matter how large.

bargaining envisioned by the NLRA. Unemployment benefits are therefore paid to striking railway employees only after following *all* of the mandated procedures. Otherwise, no benefits are paid (45 U.S.C. § 354). Given the clear teaching of numerous authorities such as *Teamsters Local 20* v. *Morton, supra,* I do not draw the conclusion from the unique railroad field that the State urges, and find the analogy inapplicable.

Subsequent to the taking of testimony herein, the United States Supreme Court, in a summary disposition, dismissed the appeal in *Kimbell, Inc.* v. *Employment Security Commission,* 429 U.S. 804, 97 S.Ct. 36, 50 L.Ed.2d 64 (1976), "for want of a substantial federal question." *Kimbell* involved post-strike payment of unemployment compensation to strikers in certain cases. The State urges that this ruling is not limited to the New Mexico statutory provisions, but is applicable to *any* state statute which authorizes payment

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of compensation to strikers. *Kimbell,* it is urged, has determined that such payments are not prohibited as being in conflict with federal labor policy. If the State is correct in this view, *Kimbell* is dispositive of this case.

The New Mexico statute at issue in *Kimbell* provides for the granting of unemployment benefits to strikers only in extremely limited and unusual circumstances which are determined after the strike is terminated,[23] N.M. Unemployment Compensation Law of 1936, § 59-9-5(d), N.M.Stat. Ann. (Supp.1975). The striker-claimants in *Kimbell,* sub-

[23] It is substantially different, both on its face, and in its operation, from New York's law which grants benefits to all strikers during the strike after a fixed waiting period.

sequent to the strike, applied for and received unemployment compensation from the New Mexico Employment Security Commission. An appeal was taken to the New Mexico District Court for the Second Judicial District, which entered an order denying the payment of unemployment compensation. The district court concluded that the claimants had been involved in a labor dispute at their last place of employment and that a "stoppage of work," which would disqualify them from benefits under New Mexico's statutory scheme, had occurred as a result of labor dispute. The court also found that:

> "Under the facts of this case payment of unemployment compensation benefits to the claimants herein would interfere with the national policy of Federal Labor Law of encouraging self organization and collective bargaining without state interference in the use of economic weapons available to both labor and management, including the policies enunciated in 29 U.S.C. §§ 157-158, on contravention of the Supremacy Clause of Article VI of the Constitution of the United States." *Kimbell, Inc.* v. *Employment Security Commission of the State of New Mexico,* Consolidated Case No. 6-73-08568, p. 9 of Findings of Fact and Conclusions of Law (N.M.Dist. Ct., Second Dist., filed October 11, 1974).

The New Mexico Supreme Court, in an unreported decision, summarily reversed the lower court on the basis of its decision in *Albuquerque-Phoenix Express, Inc.* v. *Employment Security Commission,* 88 N.M. 596, 544 P.2d 1161

(1975). *Kimbell, Inc.* v. *Employment Security Commission of New Mexico,* No. 10323 (N.M.Sup.Ct. Dec. 29, 1975).

Albuquerque had upheld the grant of unemployment compensation to strikers after finding that the claimants were available for and were actively seeking work as required by § 59-9-4(a)(3), N.M.Stat.Ann. 1953 Comp.; that they had not left work voluntarily within the meaning of § 59-9-5(a), N.M.Stat.Ann.1953 Comp. and that there was no "stoppage of work" at the company's premises which would disqualify them under § 59-9-5(d), N.M.Stat.Ann.1953 Comp.

On further appeal, the Supreme Court dismissed in a summary disposition as follows:

> "The appeal is dismissed for want of a substantial federal question. Mr. Justice Brennan, Mr. Justice Blackmun and Mr. Justice Stevens would note probable jurisdiction and set the case for oral argument."

Clearly, this is a determination on the merits of the case, *Hicks* v. *Miranda,* 422 U.S. 332, 344, 95 S.Ct. 2281, 45 L. Ed.2d 223 (1975). A federal district court, however, must now determine "what issues had been properly presented . . . and declared by [the Supreme Court] to be without substance." *Id.* at 345 n.14, 95 S.Ct. at 2290. Two courts have already expressed their views in this regard and reached opposite conclusions. The court in *Dow Chemical Co.* v. *Taylor,* 428 F.Supp. 86 (E.D.Mich. 1977), held that the summary dismissal in *Kimbell* did *not* foreclose it from considering the Michigan compensation statute on the merits. The Third Circuit ruled to the contrary in *Super Tire Engineering Co.* v. *McCorkle,* 550 F.2d 903 (3rd Cir. 1977), stating:

> "We can only conclude that, when the Supreme Court [823]
> dismissed for want of a substantial federal question in *Kimbell,* the necessary predicate for that dismissal was a determination that federal labor policy did not preclude the payment of unemployment compensation to strikers. That determination controls the labor policy aspect of this case."

On independent and careful consideration of the record and numerous briefs before the Supreme Court in *Kimbell,* I am compelled to conclude that the Court merely determined that the New Mexico compensation provisions, as a matter of *fact,* do not come into conflict with Federal labor law policy. I note that while the lower court in New Mexico found federal preemption, the reversal by the New Mexico Supreme Court was a summary reversal citing its prior decision, *Albuquerque-Phoenix Express,* which dealt entirely with state issues—construction of the relevant New Mexico statutes. I further note that the Attorney General of New Mexico moved to dismiss the appeal in the Supreme Court on the ground that the question presented to the Court "does not raise a substantial federal question of preemption sufficient for this Court to take jurisdiction." New Mexico's brief in support of that proposition is illuminating:

> ". . . the New Mexico law, like a majority of the States' laws, does not provide for payment of benefits to strikers after a fixed period of disqualification. The general rule under New Mexico law is that claimants are

disqualified from receipt of benefits for the duration of their unemployment resulting from a labor dispute which causes a substantial stoppage of work at their place of employment. As indicated in the record, the Employment Security Commission of New Mexico has allowed payment of unemployment compensation benefits to strikers in only three cases in its history, including the two cases discussed in this appeal, and only under facts similar to those present in this case where there has been no appreciable impact from the strike on the employers' continued business operations. In contrast to the Rhode Island law, the interpretation by the New Mexico Supreme Court of the New Mexico unemployment compensation statutes provides no fixed or definite policy of payment of benefits to strikers, nor allows any expectations of such payment upon which employees could reasonably predicate labor dispute strategy. In fact, the interpretation by the New Mexico Supreme Court as to when benefit payments to strikers might be authorized runs directly counter to the employees strike objectives which is to impose as substantial an impact on the employers' business operations as possible to increase his economic burden and persuade him to a satisfactory settlement. To the extent this avowed strike strategy is realized, the eligibility of striking employees for benefits is defeated.

"It is apparent, therefore, that neither the statistical history of payment of benefits to strikers nor the inconsistency between strike objectives and eligibility for benefits is likely to make the administration of the New

Mexico unemployment compensation law a factor in labor dispute negotiations or to interfere with federal labor policy. The case on appeal here as well as the *Albuquerque-Phoenix Express* case illustrates this point. In neither case did the Employment Security Commission ever reach a decision on the eligibility of the claimants for benefits until after the labor dispute was settled between the parties and a new contract agreement signed."

Obviously, the factual and legal position of the Attorney General of New Mexico would be a sound and compelling basis for the Supreme Court's summary dismissal on the merits. I find this to be the basis for the ruling and conclude that *Kimbell* is at the very least inapplicable and does not preclude me from reaching the issues in this case on the merits.

One point alone remains for discussion. The State contends that under the eleventh amendment to the United [824]

States Constitution[24] it is immune from suit because the damage award here sought would be payable to a private party from the State treasury. The State's position is, however, factually not supported, for the Unemployment Insurance Fund, although established pursuant to statute, exists separate and apart from the State's general funds

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[24] U.S.Const. amend. XI provides:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

and treasury, *New York Labor Law* §§ 550, 553. It is a pooled fund, consisting entirely of unemployment insurance contributions by employers and some federal funds. It receives *no* State funds of any kind, and is used solely to pay benefits. Indeed, the State has expressly shielded its treasury from any obligations arising out of the payment of unemployment insurance benefits and/or the administration and operation of the fund. §§ 553, 554. This being so, the State's contention is, in my opinion, without merit. See *Bowen* v. *Hackett,* 387 F.Supp. 1212 (D.R.I.1975); cf. *Fitzpatrick* v. *Bitzer,* 519 F.2d 559 (2d Cir. 1975).

On the basis of the foregoing, the New York Labor Law, to the extent it provides for the payment of unemployment compensation to strikers is state intervention on behalf of the strikers, causes an employer to finance its own strikers, is in conflict with federal labor law policy and is therefore unconstitutional and void under the supremacy clause of the United States Constitution.

The foregoing constitute my findings of fact and conclusions of law.

The parties are to appear before me on June 1, 1977, at 3:00 P.M., to discuss interim relief to the extent appropriate, and to schedule further steps herein.

So Ordered.

Memorandum and Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 4557

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, and EMPIRE CITY SUBWAY COMPANY (LIMITED),

Plaintiffs,

—against—

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, Industrial Commissioner of the New York State Department of Labor, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, and MARIO A. PROCCACINO, State Commissioner of Taxation and Finance,

Defendants.

OWEN, *District Judge.*

For the reasons expressed in *Grinnell Corp.* v. *Hackett,* 475 F.2d 449 (1st Cir. 1973), *Hawaiian Telephone Co.* v. *Hawaii Dep't of Labor and Indus. Relations,* 378 F. Supp. 791 (D.Haw. 1974) and *Dow Chemical Co.* v. *Taylor,* 57 F.R.D. 105 (E.D. Mich. 1972), defendants' motion for summary judgment pursuant to Fed. R. Civ. P., Rule 56 dismissing plaintiff's first four causes of action alleging that N.Y. Unemployment Compensation Law §592.1 violates the supremacy clause of the U.S. Const. Article VI, by unlawful

intrusion into an area preempted by the federal labor laws, is denied. Defendants' bare statistics to the effect that the percentage of idleness resulting from work stoppages and the mean duration of work stoppages is no higher in states which pay unemployment insurance benefits to strikers than in states which do not, do not alone prove that the grant of unemployment benefits to strikers has no significant impact upon the policy of free collective bargaining embedded in the federal labor laws. They only provide some primary evidence on which to "*start* analysis". *Grinnell Corp.* v. *Hackett,* 475 F.2d at 459 (emphasis added).*

The defendants' position on the issue of damages raises difficult questions on the scope of the doctrine of sovereign immunity in the light of *Edelman* v. *Jordan,* 415 U.S. 651 (1974); see *Bowen* v. *Hackett,* —— F.Supp. —— (D.R.I. Civil Action Nos. 5038 and 5041, Jan. 16, 1975). However, these questions need only be reached should plaintiff demonstrate at trial that §592.1 violates the Supremacy Clause or the Fourteenth Amendment of the Constitution.

Consequently, I defer ruling thereon until that time.

So Ordered:

Richard Owen
United States District Judge

March 26, 1975.

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* While I have substantial doubt that §592.1 is so irrational as to be violative of the Fourteenth Amendment equal protection and due process clauses as is alleged in the fifth and sixth causes of action in the complaint, I prefer to withhold decision on defendants' motion for summary judgment in its favor on these causes of action until the full record is developed at trial.